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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-5079, 97-5083

THE CHEVY CHASE LAND COMPANY OF MONTGOMERY COUNTY, MARYLAND,

Plaintiff-Appellant,

and

COLUMBIA COUNTRY CLUB,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee,

and

MONTGOMERY COUNTY,

Defendant-Appellee.

DECIDED: December 17, 1999
[As modified March 27, 2000]

Before MAYER, Chief Judge, NEWMAN and CLEVENGER, Circuit Judges.

CLEVENGER, Circuit Judge.

Chevy Chase Land Company of Montgomery County, Maryland ("Land Company") and Columbia Country Club ("Country Club") appeal from the March 19, 1997, decision of the United States Court of Federal Claims. Chevy Chase Land Co. of [*2] Montgomery County, Maryland v. United States, 37 Fed. Cl. 545 (1997) ("Chevy Chase I"). That decision granted summary judgment to the United States on the claims of the Land Company and the Country Club that their property had been taken without compensation in violation of the Fifth Amendment to the U.S. Constitution, as a result of actions taken pursuant to federal legislation known as the Rails-to-Trails Act, Pub. L. No. 98-11, Title II, 97 Stat. 42, 48 (codified at 16 U.S.C. § 1247(d) (1994)). We affirm.

I

The land in question in this case is a certain strip that was conveyed by the Land Company to the Metropolitan Southern Railroad in 1911. As a result of further conveyances in 1988, Montgomery County, Maryland, claimed title to the strip and proceeded to place a recreational trail thereon. In the Court of Federal Claims, the parties disputed whether the 1911 conveyance was one of an easement or one in fee simple absolute. The court concluded, as a matter of Maryland state law, that the initial conveyance was one in fee simple absolute, with the result that the Land Company parted with all right, title, claim or interest in the strip. See Chevy Chase I, 37 Fed. Cl. at 575. The railroad was thus free to do as it wished with the strip, and the Land Company's takings claim failed for want of a taken property interest. The court concluded that if the original conveyance had been an easement, then as a matter of state law the easement was one of limited scope that would not permit its

current recreational trail use. See id. at 586-87. Holding that the requisite acts of abandonment, under state law, had occurred before the conveyance to Montgomery County, see id. at 575-76, the court opined that under our decision in Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996), the Land Company would be entitled to compensation for an unlawful taking--assuming of [*3] course that the original conveyance to the railroad had been an easement of limited scope.

The Country Club also claimed entitlement to compensation for an unlawful taking. It argued that fee simple absolute ownership of the strip inured to it through the state law doctrines of adverse possession or lost deed. In the alternative, the Country Club argued that it had acquired easements on the strip pursuant to several state law theories, including estoppel, prescription, implication, necessity, and lost deed. As a matter of state law, the court rejected each of the Country Club's contentions. Judgment in favor of the United States was entered, and this appeal ensued. We have jurisdiction to proceed under 28 U.S.C. § 1295(a)(3) (1994).

II

We heard oral argument on these appeals in June of 1998. After briefing and during oral argument, it became clear that complex issues of state law might determine the outcome of the appeals. In particular, the Land Company argued that the Court of Federal Claims had erred in not construing the 1911 conveyance to be one of easement. The United States and Montgomery County disagreed, and also argued that the scope of the original conveyance, if an easement, was of sufficient breadth to accommodate the current recreational trail use, thus frustrating the takings claims.

In its briefs and oral argument, the Country Club abandoned the state law arguments it had made in the Court of Federal Claims to support its takings claim. Instead, it proffered in this court a new theory of state law, under which it contended that it had obtained fee simple absolute to the strip of land. Having bought land on each side of the strip from the Land Company (to build a golf course), the Country Club [*4] argued here that under Maryland law it had acquired fee simple absolute from each side of the strip to its center line.

We certified to the Court of Appeals of Maryland, pursuant to Md. Code Ann., Cts. & Jud. Proc. §§ 12-601-606 (1997), several questions for decision by the highest court of Maryland. The certified questions were: (1) Under Maryland law, did the 1911 deed convey an interest in fee simple absolute or an easement? (2) If the deed conveyed an easement, is the easement subject to any limitations as a matter of law? and (3) If the deed conveyed an easement, has the easement been abandoned as a matter of law since its conveyance, and, if so, when? See Chevy Chase Land Co. of Montgomery County, Maryland v. United States, 158 F.3d 574, 575-76 (Fed. Cir. 1998) ("Chevy Chase II") (Certification Order).

Because the Country Club waived the state law arguments it had presented to the Court of Federal Claims, we did not certify those issues. We also did not certify the new state law theory offered to us by the Country Club. We were aware that the Country Club could seek to participate in the Maryland proceedings, and that the Court of Appeals was authorized under its statutes to broaden our certification, should it wish, to include the state law issues raised by the Country Club.

III

On July 29, 1999, the Court of Appeals of Maryland answered the certified questions in a lengthy opinion, from which one member of the court dissented in part.

The court unanimously held that the 1911 conveyance was an easement, and held that the terms of the original conveyance were sufficiently broad to embrace its use as a recreational trail. See Chevy Chase Land Co. of Montgomery County, Maryland v. [*5] United States, Misc. No. 24, slip op. at 83 (Md. July 29, 1999) ("Chevy Chase III"). Citing its law, the court held that since the easement is not limited in scope to railroad purposes, and embraces the current trail use, "a party alleging abandonment must show more than an intent to abandon railroad service." Id. at 51. No such showing had been made, because all of the facts pointing to a state law abandonment concerned actions by the railroad indicating an intent to cease rail use of the easement.

The court declined to exercise its discretion to rephrase the certified questions to entertain the Country Club's argument that it had obtained fee simple absolute to the land in question.

IV

This court concluded in Preseault that:

> [E]ven if an easement rather than fee title is the nature of the property interest held by the railroad at the time of the conversion to a public trail, if the terms of the easement when first granted are broad enough under then-existing state law to encompass trail use, the servient estate holder would not be in a position to complain about the use of the easement for a permitted purpose.

100 F.3d at 1552.

The current posture of this case is as follows. The Court of Appeals' answers to the certified questions, which we accept, state that the current recreational trail use of the easement is a permissible use, no acts of abandonment of that use being shown. Consequently, as we stated in Preseault, the servient estate holder, here the Land Company, cannot show a property interest that has been impermissibly taken. We do not consider the Country Club's new state law argument, see Jay v. Secretary of Health & Human Servs., 998 F.2d 979, 983, n.4 (Fed. Cir. 1993), and thus the Country Club lacks grounds to support its takings claim.

[*6] We note that the Court of Appeals of Maryland, in an alternative discussion, opined as to the circumstances that would exist if the easement in question had not been of sufficient scope to support the current recreational trail use. See Chevy Chase III at 52-82. A majority of the court concluded that the activities of the railroad, Montgomery County and the United States, in conversion of the easement pursuant to the Rails-to-Trails Act, did not work an abandonment of the easement, assuming it had been an easement for rail use only. See id. at 82. On that point, a member of the court dissented, arguing that such a view of the conversion process is inconsistent with the holding of Preseault, in which we expressly held that the easement in question was not of sufficient scope to support recreational trail use, and that the facts in that case demonstrated that the Preseaults had suffered an uncompensated taking of their property. See Chevy Chase III at 12-13 (Cathell, J. dissenting).

We reach our decision on these appeals, as to the Land Company, on the state law ground that the original easement authorizes the current recreational trail use. We express no view on the disagreement in the Court of Appeals of Maryland as to the alternative reasoning; it will be time

enough for us to resolve that disagreement when it comes before us in a dispositive posture.

Because we have discarded the grounds on which the appellants could assert a property interest taken in violation of the Fifth Amendment, we affirm the judgment from which the appeals are taken.

COSTS

No costs.

U.S. Court of Appeals for the Federal Circuit
Case # 97-5079, -5083

IN THE COURT OF APPEALS OF MARYLAND

Misc. No. 24

September Term, 1998

CHEVY CHASE LAND COMPANY et al.

v.

UNITED STATES et al.

Bell, C. J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell

JJ.

Opinion by Chasanow, J.
Cathell, J., Dissents

Filed: July 29, 1999

[**1] This case comes to us by a certified order pursuant to Maryland Code (1974, 1998 Repl. Vol.), Courts & Judicial Proceedings Article, §§ 12-603 to 12-609 from the United States Court of Appeals for the Federal Circuit. That court seeks our resolution of the parties' state law property disputes so that it may determine whether an uncompensated taking of private property has occurred in violation of the Fifth Amendment of the United States Constitution.[1] The questions pertain to a right-of-way in Montgomery County called the "Georgetown Branch" that was granted to a railroad in 1911 and that has been converted for use as a hiker/biker trail under the federal "Rails-to-Trails" Act (the Act).

Specifically, the case requires that we construe a 1911 deed from appellant Chevy Chase Land Company of Montgomery County (CCLC or the land company) to the Metropolitan Southern Railroad Company (MSRC or the railroad),[2] which is a predecessor in interest to the right-of-way now owned by appellee Montgomery County (the County). Additional parties to this appeal include appellant Chevy Chase Country Club (Country Club), which claims an interest in the right-of-way for which it should be compensated, and appellee the United States, which along with the County was named as a defendant in this takings claim. The certified questions are as follows:

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[1]The Fifth Amendment of the United States Constitution states in pertinent part: "nor shall private property be taken for public use, without just compensation".

[2]The Metropolitan Southern Railroad Company (MSRC) was a subsidiary of the B&O Railroad, which later became a subsidiary of the CSX Corporation. Unless otherwise indicated, for purposes of this opinion we shall refer to the MSRC, B&O, or CSX simply as the "railroad."

1. Under Maryland law, did the 1911 deed convey [**2] an interest in fee simple absolute or an easement?

2. If the deed conveyed an easement, is the easement subject to any limitations as a matter of law?

3. If the deed conveyed an easement, has the easement been abandoned as a matter of law since its conveyance and, if so, when?

We examine each of the certified questions, in *seriatim*.

Addressing the first question in Part II, we conclude that the 1911 deed granting a "right-of-way" to the railroad conveyed an easement. The use of the "right-of-way" language provides a strong indication that the parties intended to convey an easement as opposed to an estate in fee simple absolute. We find nothing in the deed to indicate that anything more than a right of passage was intended, particularly in light of the deed's separate grant "in fee simple" of other land upon which a passenger station was to be located. Our conclusion is confirmed by the circumstances of the conveyance, including the 20-year existence of the railway and the nominal consideration paid by the railroad for the right-of-way. Moreover, the conveyance of the right-of-way in fee simple would not have furthered any purpose of the railway not served by its conveyance as an easement and could adversely affect the public's interest in the best use of the land. *See* Part II.B., *infra*.

Regarding the second certified question, we conclude in Part III that use of the right-of-way as a recreational trail falls within the scope of the easement. The language of the deed includes no express limitations on the use of the right-of-way; rather, it indicates through its use of terms such as "free" and "perpetual" that the parties contemplated

general [**3] use of the land as a way of passage through Montgomery County. In light of our decisions holding that easements for public highways are subject to reasonable changes in mode of transportation and the railroad's status as a highly regulated public service corporation, recreational trail use of a general use right-of-way is within the legally anticipated scope of the 1911 deed. Finally, the use of the right-of-way as a trail poses no unreasonable burden on the underlying fee simple estate, as it is self-evident that bikers and walkers inflict less of a burden on a right-of-way than a freight railroad.

In Part IV we explain why, as a matter of law, the railroad did not abandon its easement prior to assigning it to Montgomery County in 1988. To the extent that the appellants' arguments regarding abandonment hinge on their contention that the scope of the easement is limited to railroad purposes, our holding in Part III also disposes of this issue. Even if appellants' abandonment arguments are not contingent upon a more limited scope, there is insufficient evidence for appellants to meet their burden of proving abandonment. When determining whether there is an abandonment, the fact that the easement is regulated by federal railroad law is a circumstance that may be relevant to the intent to abandon. The railroad's actions in conformance with federal law cannot supply the decisive and unequivocal act necessary to prove that it abandoned its state law property interest. This is particularly the case when the railroad's actions were entirely consistent with an intent to sell the right-of-way and when a finding otherwise would mean that the railroad intended to violate federal law, exposing itself to criminal and civil liability, when [**4] no evidence would support the finding of such an intent. Finally, appellants presented no other evidence that would be sufficient to support a finding of abandonment.

I. BACKGROUND

A. Factual Background

The stipulated facts show the following. The property alleged to have been taken and for which the appellants seek compensation is a strip of land approximately one mile long and 100-feet wide, spanning some 12 acres in Montgomery County, Maryland, that lie on either side and across Connecticut Avenue in Chevy Chase. The mile-long stretch is a segment of an approximately 6.4 mile former railroad line in Montgomery County known as the Georgetown Branch, which runs from Silver Spring southwesterly into the District of Columbia.

The land company was founded in 1890 in part to develop the residential area now known as Chevy Chase and it then owned all the land relevant to this case. In 1891, the land company and the railroad entered into an agreement whereby the land company would convey the "right-of-way" over the mile-long stretch of land and a second parcel "for the purposes of a passenger and freight depot." As part of the agreement, the railroad agreed to erect a passenger station on the second parcel to cost not less than $4,000 (or it would contribute $4,000 toward the land company's construction of the station), to build the tracks to Connecticut Avenue on or before August 31, 1891, and to charge the land company half [**5] rates on freight delivered over the line. The railroad missed the August 31, 1891, deadline, but built that portion of the line in 1892, while the rest of the line was not completed until 1910; it never built the passenger and freight station nor did it pay the $4,000 toward the land company's construction of the station. In 1909, the Country Club bought more than 125 acres of land from the land company primarily for use as a golf course. The deed conveyed the property in two separate parcels described by metes and

bounds with one parcel on each side of the railroad's right-of-way.

In 1911, after the railroad line had been constructed and in operation for 19 years, the land company executed a deed conveying to the railroad, "its successors and assigns, a free and perpetual right of way" over the land referred to in the 1891 agreement. The deed also conveyed, in "fee simple," the parcel of land on which the depot was to have been built. The railroad paid $4,000 for the conveyance, and the deed stated that the 1891 agreement was "mutually abrogated, canceled and set aside, and the [railroad] is hereby released and discharged from the obligation ... of erecting a passenger station to cost not less than Four Thousand (4,000) Dollars." *See* Part II.C.1.

The railroad used the right-of-way for shipping freight continuously from 1892 until 1985, when damage to a bridge on the right-of-way prevented its use. Between 1969 and 1985, however, traffic over the line had decreased by over 90%. In 1983, in conformance with federal law, the railroad posted a notice on the Georgetown Branch that it would be the subject of an abandonment application before the Interstate Commerce Commission (ICC). [**6] A series of internal corporate decisions were made by the railroad in 1984 and 1985 to abandon service over the Georgetown Branch. On April 9, 1986, the railroad applied to the ICC for authorization to abandon rail service on the line, as required by federal regulation. *See* 49 U.S.C. § 10903 (1988);[3] 49 C.F.R. §§ 1152.20-22; and Part IV.A.2. The ICC issued a tentative decision on February 25, 1988, permitting

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[3] In this opinion, we shall cite to federal laws and regulations existing in 1988, when the Interstate Commerce Commission (ICC) issued its order and when the right-of-way was conveyed to Montgomery County.

abandonment on condition that the railroad continue to maintain the right-of-way in order to facilitate the possible acquisition of the right-of-way for public use pursuant to the Rails-to-Trails Act, which is codified at 16 U.S.C. § 1247(d)(1988)(*see* footnote 3).

After the ICC's tentative decision, Montgomery County began discussions with the railroad about acquiring the right-of-way for a light-rail system as well as a hiker/biker path pursuant to the Rails-to-Trails Act. On December 12, 1988, the ICC approved the purchase and transfer of use of the right-of-way to Montgomery County. Four days later the railroad conveyed the entire Georgetown Branch to Montgomery County by quitclaim deed for the County's payment of $10 million. As described in more detail in Part IV.A.2., as a result of the ICC's actions pursuant to the Act, regulatory abandonment of the railroad right-of-way was delayed indefinitely.

We will provide more facts as we examine each of the certified questions. Additional facts are also available in the opinion of the federal trial court, *Chevy Chase Land Co. of* [**7] *Montgomery v. U. S.*, 37 Fed. Cl. 545 (1997).

B. Summary of Arguments and Case History

The plaintiffs/appellants assert that the 1911 deed conveyed an easement. They further argue that the proposed use of the easement as a hiker/biker trail is beyond its scope, which they contend is limited to railroad uses. Alternatively, they contend that the easement was abandoned prior to the railroad's conveyance of the quitclaim deed to the County. Accordingly, appellants conclude that a reversion of the easement occurred and that they own the right-of-way unencumbered by any other interest. Thus, they are seeking compensation in federal court for the "taking" of their

interest in the right-of-way by Montgomery County under the Rails-to-Trails Act.

Defendants/appellees Montgomery County and the United States, on the other hand, argue that the 1911 deed conveyed to the railroad an interest in the right-of-way in fee simple absolute and therefore the appellants have had no interest in the property since 1911. Alternatively, should the deed be found to have conveyed an easement, they contend that the use of the right-of-way as a hiker/biker trail pursuant to federal law is within the scope of the easement and that the railroad never abandoned the easement. Accordingly, they conclude that no taking occurred. We are concerned only with the state law property issues and not with the takings claim itself.

The United States Court of Federal Claims (CFC), where appellants filed their takings [**8] claim, found in favor of Montgomery County and the United States. *Chevy Chase Land Co. of Montgomery, supra*. The CFC concluded that the 1911 deed conveyed a fee simple absolute and granted summary judgment in favor of appellees. *Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 565-75. Although that conclusion disposed of the case, the CFC went on, in *dicta*, to conclude that if it was an easement that was conveyed, the easement was abandoned by the railroad prior to its conveyance to the County. *Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 575-80. Also in *dicta*, the CFC stated that the language of the 1911 deed did not limit the scope of the easement to railroad purposes (thereby implying that the use as a hiker/biker trail would not cause a reversion) but that if the deed were limited to railroad purposes, the proposed use would be beyond the scope of the easement, thereby causing a reversion giving rise to a takings claim. *Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 585-87. The land company and the Country Club appealed

to the United States Court of Appeals for the Federal Circuit, which certified the state law property questions to this court.

II. THE RAILROAD'S PROPERTY INTEREST

The first question asks whether the 1911 deed conveyed an interest in fee simple absolute or an easement. The question requires that we construe the 1911 deed between the land company and the railroad. We begin with a summary of the principles involved in construing a deed. We then consider how the courts of this State and other states have [**9] construed the phrase "right-of-way." We then apply those principles to the deed conveyed by the land company to the railroad.

A. Basic Principles of Deed Interpretation

In construing a deed, we apply the principles of contract interpretation. *Buckler v. Davis Sand, Etc., Corp.*, 221 Md. 532, 537, 158 A.2d 319, 322 (1960). These principles require consideration of "'the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution,'" *Calomiris v. Woods*, 353 Md. 425, 436, 727 A.2d 358, 363 (1999)(quoting *Pacific Indem. v. Interstate Fire & Cas.*, 302 Md. 383, 388, 488 A.2d 486, 488 (1985)). At least initially, the construction of a deed is a legal question for the court, and on appeal, it is subject to *de novo* review. *Calomiris*, 353 Md. at 433-35, 727 A.2d at 362-63. "'It is a cardinal rule in the construction of deeds that 'the intention of the parties, to be ascertained from the whole contents of the instrument, must prevail unless it violates some principle of law.'" *D. C. Transit Systems v. S.R.C.*, 259 Md. 675, 686, 270 A.2d 793, 798-99 (1970)(*D.C. Transit I*)(quoting *Marden v. Leimbach*, 115 Md. 206, 210, 80 A. 958, 959 (1911)). Thus, we must consider the deed as a whole, viewing its language in light of the facts and

circumstances of the transaction at issue as well as the governing law at the time of conveyance.

B. Right-of-Way

[**10] In railroad parlance, "the term 'right of way' has two meanings: in one sense it is 'the strip of land upon which the track is laid'; in the other sense it is 'the legal right to use such strip,' and in this sense it usually means the right of way *easement*." *Ma. & Pa. RR. Co. v. Mer.-Safe, Etc., Co.*, 224 Md. 34, 36-37 n.1, 166 A.2d 247, 248 n.1 (1960)(quoting *Quinn v. Pere Marquette Ry. Co.*, 239 N.W. 376, 379 (1931)). *See also Joy v. City of St. Louis*, 138 U.S. 1, 44, 11 S.Ct. 243, 256, 34 L.Ed. 843, 857 (1891)("[T]he term 'right of way' ... sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed."). *Cf.* Philip A. Danielson, *The Real Property Interest Created In a Railroad Upon Acquisition of Its "Right of Way,"* 27 ROCKY MTN. L. REV. 73, 74 (1954)(noting the two meanings and stating that "[i]n law [right of way] is synonymous with 'easement' — a legal concept").

Nevertheless, it has generally been held by courts of this and other states that "deeds which in the granting clause convey a 'right of way' are held to convey an easement only." *Deed to Railroad Company as Conveying Fee or Easement*, Annotation, 6 A.L.R.3d 973, § 3, at 977 (1966); *The Real Property Interest Created In a Railroad Upon Acquisition of Its "Right of Way,"* 27 ROCKY MTN. L. REV. at 84 ("[I]f the conveyance is of a 'right of way,' or of land 'for a right of way,' the courts tend to find an *easement*")(emphasis in original; footnote omitted). As explained in Professor Elliott's 1907 treatise on railroad law:

> "'Right of way,' in its strict meaning, is 'the right of passage over another man's ground;' and in its legal and generally [**11] accepted meaning, in reference to a railway, it is a mere easement in the lands of others, obtained by lawful condemnation to public use or by purchase. It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee-simple of lands to be used for a railway or any other kind of way."

2 ELLIOTT ON RAILROADS § 1158, at 628 n.77 (3d. ed. 1907)(quoting *Williams vs. Western Union Railway Company*, 5 N.W. 482, 484 (Wis. 1880)). *See also Richfield Oil Corp. v. Railroad Co.*, 179 Md. 560, 572, 20 A.2d 581, 587 (1941); *D.C. Transit I*, 259 Md. at 688, 270 A.2d at 799 (both quoting ELLIOTT ON RAILROADS).

Maryland courts have often construed deeds of "rights-of-way" to railroads as easements or have used the terms "easement" and "right-of-way" synonymously. *See, e.g., D.C. Transit I,* 259 Md. at 689, 270 A.2d at 800 ("The addition of the language for 'a right of way' in the *habendum* clause ... makes clear the intent of the parties to grant an easement....")(emphasis in original); *Richfield Oil Corp.*, 179 Md. at 572, 20 A.2d at 587-88 (quoting 2 ELLIOTT ON RAILROADS § 1158, at 627-28 (3d ed. 1907)("'Where the intention to convey a fee does not appear, as in case of the conveyance of a "right of way" for the railroad through certain lands, the company takes an easement only.'"); *Greenwalt v. McCardell*, 178 Md. 132, 136, 12 A.2d 522, 524 (1940)("Where a *right of way* is established by reservation, the land remains the property of the owner of the servient estate, and he is entitled to use it for any purpose that does not interfere with the *easement.*")(emphasis added); *Miceli v. Foley,* 83 Md. App. 541, 570, 575 A.2d 1249, 1264 (1990)("Absent an express intention to convey a fee, a grant

of a right of way to a railroad [**12] is generally considered to be an easement."). Our cases are consistent with those of other jurisdictions.[4]

The general rule that the terms "right-of-way" and "easement" are synonymous came about because the rule is consistent with the likely intent of the parties to a deed when the term "right-of-way" is used. As we observed in *Green Tr. v. Eldridge*, 230 Md. 441, 448, 187 A.2d 674, 678

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[4] *See, e.g., City of Port Isabel v. Missouri Pacific. R. Co.*, 729 S.W.2d 939 (Tex. Ct. App. 1987)(holding that deed to railroad "in fee simple" of "the right of way" conveyed an easement only); *Hartman v. J. & A. Development Co.*, 672 S.W.2d 364 (Mo. Ct. App. 1984)(holding that a deed of a right-of-way conveyed an easement rather than a fee because use of term right-of-way and road are almost "conclusive indications" that the interest conveyed is an easement); *Fischer v. Trentmann*, 672 S.W.2d 139 (Mo. Ct. App. 1984)(similar holding); *Pollnow v. State Dept. of Natural Resources*, 276 N.W.2d 738, 744 (Wis. 1979)(quoting *Williams vs. Western Union Railway Company*, 5 N.W. 482, 484 (Wis. 1880)("'Right of way,' in its strict meaning, is 'the right of passage over another man's ground,' and in its legal and generally accepted meaning, in reference to a *railway*, it is a mere easement in the lands of others, obtained by lawful condemnation to public use, or by purchase.")(emphasis supplied); *Veach v. Culp*, 599 P.2d 526 (Wash. 1979)(use of language "right-of-way" is conclusive of intent to convey easement); *Hutson v. Agricultural Ditch & Reservoir Co.*, 723 P.2d 736 (Colo. 1986)(holding that condemnation decree of right-of-way constituted an easement because an easement would accomplish purpose of decree); *Missouri-Kansas-Texas Railroad Company v. Freer*, 321 S.W.2d 731, 736 (Mo. Ct. App. 1958)("Conveyances of right of way are held to create easements only.")(footnote omitted); *see also* RESTATEMENT (THIRD) OF PROPERTY § 2.2, "Intent to Create a Servitude" cmt. g (Tentative Draft No. 1, 1989)("The fact that the grantee is a railroad may also tend to indicate that the instrument should be construed to convey an easement only. The narrowness of the parcel, the consideration paid, and the frequency with which railroad uses have been abandoned often lead to the conclusion that the grantor, as a reasonable person dealing with a railroad, intended to grant no more than an easement for the right of way, retaining ownership of the land.").

(1963): "The fact that the word 'easement' was not used to designate the property interest passing is not of particular significance, since use of the phrase 'right of way' is generally understood to mean that only an easement is being granted." *See also* [**13] *Pub. Serv. Commn. v. Gas Etc. Corp.*, 162 Md. 298, 312, 159 A. 758, 763 (1932)(quoting *Bosley v. Susquehanna Canal*, 3 Bland 63, 67 (1830)("'A right of way, whether public or private, is essentially different from a fee simple right to the land itself over which the way passes. A right of way is nothing more than a special and limited right of use....'").

Furthermore, policy considerations support interpreting the conveyance of a "right-of-way" to a railroad as an easement where the intent to convey an estate in fee is not clearly expressed. A great number of railroad corridors have been abandoned in recent years. *See Preseault v. ICC*, 494 U.S. 1, 5, 110 S.Ct. 914, 918, 108 L.Ed.2d 1, 10 (1990)(observing that the nation's railway system has lost about 130,000 miles of track since 1920 and noting that "experts predict that 3,000 miles will be abandoned every year through the end of this century")(footnote omitted). Whether a right-of-way is construed as an estate in fee simple or an easement has significant implications for the utility of the land upon abandonment. If the deed of a right-of-way is construed as an estate in fee simple, the railroad will retain the right-of-way even after it is no longer used for any transit purposes — effectively severing otherwise contiguous pieces of property, and for no useful purpose. As the Indiana Supreme Court has explained:

> "Public policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes, either by deed or condemnation. This policy is based upon the fact that the alienation of such strips or belts of land from and

> across the primary or parent bodies of the land from which they are severed[] is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that [**14] thereafter such severance generally operates adversely to the normal and best use of all the property involved."

Ross, Inc. v. Legler, 199 N.E.2d 346, 348 (Ind. 1964). *See also The Real Property Interest Created In a Railroad Upon Acquisition of Its "Right of Way,"* 27 ROCKY MTN. L. REV. at 74 (observing that construing a right of way as an easement "seems socially more desirable, since it helps clear titles and prevents long narrow strips of agricultural land from being separated from the adjoining farms, with attendant waste and inconvenience."). We have previously recognized that the construction of a right-of-way as a fee simple would not further any significant interest that is not served by construction as an easement. *See D.C. Transit I,* 259 Md. at 688, 270 A.2d at 800 (construing a deed to a railroad as an easement in part because it would not serve any useful purpose to convey "a strip of land 80 feet wide" as an estate in fee); *Ma. & Pa. RR. Co.*, 224 Md. at 37, 166 A.2d at 249 (following the "general rule ... that a railroad company acquires only an easement in a right of way by prescription .... [because] the nature of the user by the railroad requires no more than an easement in the right of way"). *See also Daugherty v. Helena & Northwestern Ry.*, 252 S.W.2d 546 (Ark. 1952)(holding that a deed conveying a strip of land for a right-of-way created an easement rather than a fee primarily because the parcel would be useful for little else because of its shape); *Hartman v. J. & A. Development Co.*, 672 S.W.2d 364 (Mo. Ct. App. 1984)(recognizing that long narrow strips of land serve little or no function other than for easements or rights-of-way).

This is not to say that a deed conveying a "right of way" to a railroad cannot convey [**15] an estate in fee simple. It is well settled that a deed to a railroad, even though it characterizes the grant as conveying a right-of-way, may convey an estate in fee simple. *See Hodges v. Owings*, 178 Md. 300, 303, 13 A.2d 338, 339 (1940)(observing that the railroad's charter authorized it to take an estate in fee). However, when a deed conveying a right-of-way fails to express a clear intent to convey a different interest in land, a presumption arises that an easement was intended. "The logical rule ... is that where the deed is ambiguous *and* the granting clause is not specific, references to the interest being conveyed as a right-of-way gives rise to a presumption that an easement was intended. " Danaya C. Wright, *Private Rights and Public Ways: Property Disputes and Rails-to-Trails in Indiana*, 30 IND. L. REV. 723, 740 (1997). *See also Miceli*, 83 Md. App. at 571, 575 A.2d at 1265 ("As there is insufficient evidence to rebut the presumption that a condemning railroad takes an easement, we hold that the railroad did not acquire a fee simple absolute in the property at issue.")

C. Application to the 1911 Deed

1.

The deed in question was executed on March 22, 1911, and recorded on April 4, 1911. In pertinent part, the granting clause of the deed states:

> "[T]he said party of the first part [the land company] for and in consideration of the sum of FOUR THOUSAND (4,000) DOLLARS, to it paid by the said party of the second part, *does hereby grant and convey* unto the said party of the second part [the railroad], its successors and assigns, *a free and perpetual right of way*, one hundred (100) feet wide,

> *over the land and* [**16] *premises hereinafter designated as 'Parcel A'* and does hereby *grant and convey* unto the said party of the second part [the railroad], its successors and assigns, *in fee simple, the land and premises, hereinafter designated as 'Parcel B'....*" (Emphasis added).

The deed then provides a metes and bounds description of Parcel A, the "right-of-way," and Parcel B, the land granted in "fee simple." Parcel A is summarized as "being a *strip of land* fifty (50) feet wide on each side of the center line of the Metropolitan Southern Railroad through the land of [t]he Chevy Chase Land Company...." (Emphasis added). The granting clause pertaining to Parcel A is made subject to an "existing right of way for highway and other purposes over what is known as Connecticut Avenue Extended."

The deed's warranty clause states:

> "AND the said party hereto of the first part hereby covenants to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite."

Finally, the deed provides that

> "in consideration of the execution and delivery of this Deed, and of the payment of the consideration herein expressed, the ... agreement entered into on [April 21, 1891] ... is mutually abrogated, canceled and set aside, and [MSRC] is hereby released and discharged from the obligation set forth in said contract, of erecting a passenger station to cost not less than Four Thousand (4,000) Dollars, or of contributing the sum of Four Thousand (4,000) Dollars toward the erection by ... [CCLC] of a passenger station on the hereinbefore described parcel of land designated as Parcel "B"; and the said

> [MSRC], as is evidenced by its acceptance of this conveyance, hereby releases [CCLC] from any obligation ... to erect or cause to be erected the passenger station aforesaid."

[**17] As the cases just reviewed demonstrate, and as appellees and the CFC acknowledge, we have consistently construed conveyances of rights-of-way to railroads as easements and not estates in fee simple. The use of the term "right of way," however, does not *ipso facto* create an easement; rather the language of the deed must be viewed as a whole in the context of the entire transaction. As explained next, we believe that the express language of the deed in light of the circumstances makes sufficiently clear the intention of the land company and the railroad to create an easement. *See Desch v. Knox*, 253 Md. 307, 310-11, 252 A.2d 815, 817 (1969)(holding deed conveyed "right-of-way" based on the language of the deed); *Fedder v. Component Struct. Corp.*, 23 Md. App. 375, 380, 329 A.2d 56, 60 (1974)(holding that the "intention of the parties [to convey an easement was] crystal clear" when deed conveyed a "right-of-way" and "[w]hen the simple language of the contract is considered in the surrounding circumstances." We first examine the language of the deed itself and only then turn to the circumstances of the conveyance.

2.

Initially, we note what is obvious about the deed. The granting clause does not state that a piece of land is being conveyed nor does it provide any indication that an estate in fee simple was intended to be conveyed. The language "free and perpetual" sheds no light on whether a nonpossessory or possessory interest is being conveyed, since an estate in fee or an easement may be "free and perpetual." *See* Md. Code (1974, 1996 Repl. Vol.), Real [**18] Property Art., § 4-105 ("[E]very grant or reservation of an easement passes or

reserves an easement in perpetuity."). Rather, the granting clause of the deed directly conveys a "right of way." The appellees therefore have a high hurdle to overcome in order to demonstrate that the term right-of-way was used "in [the] unusual sense ... [of] an absolute purchase of the fee-simple of lands...." 2 ELLIOTT ON RAILROADS § 1158, at 628 n.77 (3d ed. 1907)(quoting *Williams*, 5 N.W. at 484).

That hurdle is elevated upon further examination and a contrasting of the deed's dual granting clauses. The two granting clauses each declare the land company's intent to "hereby grant and convey." First, the land company conveyed "a free and perpetual *right of way*, one hundred (100) feet wide, over the land and premises hereinafter designated as 'Parcel A.'" Second, the land company conveyed to MSRC "in fee simple, the land and premises, hereinafter designated as 'Parcel B.'" Appellees contend that because each clause contains the word "grant" the land company intended to pass an estate in fee simple even though the first clause grants a "right of way" while the second clause conveys the "land and premises" in "fee simple." The CFC concluded that the use of the term "fee simple" in reference to Parcel B merely referenced duration of the estate conveyed and not the estate itself. *Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 571. Relying in part on extrinsic evidence, the CFC concluded that the language "fee simple" in reference to Parcel B was synonymous with the term "perpetual" in reference to Parcel A and thus both granting clauses conveyed estates in fee. *Id.*

[**19] We believe that the CFC's and appellees' construction of the deed is overly strained. If the land company intended to convey estates in fee over both parcels, it would have been unnecessary to include two separate granting clauses. Moreover, given that two granting clauses were used, if they had intended to convey the same interest,

we believe the author of the deed would have used the same language. Neither the CFC nor appellees explain why different language was used if the intent was to convey the same interest in both parcels. To hold that both Parcel A and Parcel B conveyed estates in fee would be to ignore what we believe is self-evident from the deed: that the parties intended to convey different interests, one for the "right of way" designated as Parcel A and the other for "the land and premises" in "fee simple" and designated as Parcel B. If the intent was to convey Parcel A as an estate in fee, no drafting hurdles would have prevented making such intent explicit. *Cf. United States v. 1.44 Acres of Land, Etc., Montgomery County, Md.*, 304 F. Supp. 1063, 1071 (D. Md. 1969)(applying Maryland law)("[A] legal draftsman ... would not use such [right-of-way] language to convey a fee title to a railroad.").

Appellees further attempt to bootstrap the description of Parcel A as a "parcel of land" into the granting clause to show that an estate in fee of the right-of-way was intended to be conveyed. As noted above, the description of Parcel A is found in a separate paragraph of the deed, which summarizes Parcel A as a "parcel of land ... being a strip of land fifty (50) feet wide on each side of the center line of the Metropolitan Southern Railroad through the land of [t]he Chevy Chase Land Company."

[**20] We disagree as to the implications of the language "parcel of land" in the description of "Parcel A" in the deed. The language is used in the portion of the deed establishing the *location* of the right-of-way, not the interest granted. Language used in a descriptive clause is less important than the language of the granting clause in denoting what interest in land is conveyed by a deed. *See Marden*, 115 Md. at 209, 80 A. at 959 (observing that, when determining the interest conveyed by a deed, in the case of

conflict the granting clause generally prevails over the habendum clause). Indeed, the granting clause for Parcel B explicitly stated that what was being conveyed was "the land and premises" while the disputed grant was of a "right of way ... *over* the land and premises." (Emphasis added). Furthermore, as discussed next, in previous cases we have construed language similar to the "parcel of land" language upon which appellees rely. In these cases the deed language was found not in a descriptive clause but in the granting clause itself, and we nevertheless found that the deed conveyed an easement in lieu of the reference to the interest as a "right-of-way."

In *Green,* the deed was entitled a "Right of Way Deed." 230 Md. at 447-48, 187 A.2d at 677. The granting clause conveyed in fee simple "'the free and uninterrupted use, liberty and privilege of, and passageway in and along a certain right of way....'" Despite the reference to the grant in "fee simple," we concluded based on the entire instrument and the circumstances of the transaction that the deed granted an easement only, "with the fee remaining in the original grantor, his heirs and assigns." *Green,* 230 Md. at 448, 187 A.2d [**21] at 677.

Another example is *East Wash. Railway v. Brooke*, 244 Md. 287, 223 A.2d 599 (1966). In that case, the granting clause of the deed conveyed a "'*strip of land* for a right of way through said lands.'" *Brooke*, 244 Md. at 293, 223 A.2d at 603 (emphasis added). A description of the strip of land summarized it as being "'land sixty feet in width ... as now located and used *for railroad purposes.*'" *Brooke*, 244 Md. at 294, 223 A.2d at 603 (emphasis in original). Even though the granting clause conveyed a "strip of land" (which seems synonymous with "parcel of land"), we concluded that "[i]t is plain that the conveyance was of an easement for railway purposes and use only." *Id.*

A final example is *D.C. Transit I, supra.* In that case, the deed we interpreted "'grant[ed] and convey[ed] ... all the piece or parcel of land'" described in the deed. *D.C. Transit I*, 259 Md. at 679, 270 A.2d at 795. The habendum clause stated as follows:

> "'To have and hold the same unto and to the use of ... [the railroad company] *for a right of way* and such other purposes as said Railway Company is authorized under its act of incorporation ... and the General Incorporation Law of this State to acquire, dispose of or deal in real estate.'" (Emphasis in original.)

D.C. Transit I, 259 Md. at 680, 270 A.2d at 795. The granting clause thus conveyed "*all* the piece or parcel of land" (emphasis added) with the only reference to the "right-of-way" being in the habendum and not the granting clause. Moreover, the deed explicitly stated that the right-of-way could be used for purposes for which the railroad company was authorized under the law, and the deed itself noted that such authorization included the acquisition and [**22] disposal of real estate. Nevertheless, we concluded based on the deed language and the circumstances that the parties intended to convey an easement only. We observed that the statute authorizing the railroad to acquire and dispose of real estate was for the purpose of "laying out town sites, erecting buildings and opening and working quarries" and "a strip of land 80 feet wide is hardly a town site .... [and] is an unlikely place for the erection of buildings of consequence." *D.C. Transit I*, 259 Md. at 688, 270 A.2d at 800. Moreover, we observed that the use of the term "right of way" in the habendum clause was "obviously intended to have some meaning [and] makes clear the intent of the parties to grant an easement." *D.C. Transit I*, 259 Md. at 689, 270 A.2d at 800.

That the deed in this case conveys an easement and not an estate in fee follows, *a fortiori,* from *Green, Brooke*, and *D.C. Transit I.* Unlike *Green*, in the instant case there is no express language suggesting that the right-of-way was conveyed in "fee simple" (even though Parcel B was conveyed "in fee simple"). Furthermore, we do not see any legally significant difference between the "strip of land" in *Brooke* and the "parcel of land" in this case, and, unlike the instant case where the express grant was of a "right of way," the grant in *Brooke* was expressly of a "strip of land." Therefore, the deed in *Brooke* provided a much stronger reason under appellees' analysis to conclude that an estate in fee simple was conveyed rather than a servitude. We nevertheless found it "plain" in *Brooke* that the grant conveyed an easement only.

Finally, that the 1911 deed conveyed an easement seems compelled by our holding [**23] in *D.C. Transit I,* where the granting clause conveyed "all the piece or parcel of land" and the only reference to a right-of-way was in the deed's habendum clause. The deed in the instant case contains nearly identical language as in *D.C. Transit I* ("right of way" and "parcel of land"), but it more clearly indicates an easement was granted than *D.C. Transit I* since the granting clause directly conveys a right-of-way and the only reference to a "parcel of land" is in the descriptive clause — the opposite locations in which the phrases were used in the deed at issue in *D.C. Transit I.* Therefore we find unconvincing appellees' creative attempt to argue that, given the definition of Parcel A as a "parcel of land" in the descriptive clause, the "right of way" in the granting clause refers not to the legal right to use the land but rather to the strip of land itself.

3.

The circumstances and positions of the parties to the 1911 deed confirm that the deed conveyed an easement and

not an interest in fee simple absolute. Both the CFC and appellees emphasize the lack of conditional language in the 1911 deed restricting the uses of the right-of-way or setting forth its purposes. *Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 569 (emphasizing "the outright grant of the right-of-way and the absence of purpose limitations"). They argue that the lack of conditional language in the 1911 deed is what distinguishes the term "right-of-way" in that deed from the rights of way in the numerous Maryland cases that were construed to be easements. For example, the CFC stated [**24] that "[t]he 1911 deed does not even refer to the word 'railroad,' let alone restrict the use of the land to railroad purposes." *Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 571. Turning to evidence extrinsic to the deed, the CFC supported its conclusion by quoting from other deeds executed by the land company to railroad companies that conveyed easements which contained purpose language. *Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 570. For example, the court quotes from a deed stating that the "right-of-way" is subject to the railroad "construct[ing] and complet[ing] and commenc[ing] regular operat[ions] within nine months" and another deed conveying a "right of way for the purpose of constructing and operating the railroad." *Id.*

While the CFC and appellees correctly point out that there are no purpose limitations in the 1911 deed, they entirely overlook the fact that the railway for which the conveyance was executed had already been built and was in operation for nearly 20 years prior to the 1911 conveyance. Thus, unlike the right-of-way deeds examined in our prior cases, and unlike the land company's deeds to other railroads, the 1911 deed did not convey an undeveloped railroad corridor but rather a railway that had been in existence for quite some time. As a result, there was little need to state in the deed the purposes for which the

right-of-way was conveyed. Regardless, contrary to the intimations of appellees and the CFC, our prior cases have never stated that a right-of-way deed must include purpose language. Rather, we have looked to the circumstances and positions of the parties. In this case, the fact that both parties to the deed were well aware that the right-of-way was to be [**25] used for a freight and passenger railroad that had been in operation for many years overcomes any need for limiting language in the deed itself for purposes of creating an easement as opposed to an estate in fee simple absolute.

Furthermore, construing the deed to convey an easement is consistent with the 1891 agreement between the land company and the railroad. That agreement was made "in contemplat[ion of] the construction of a line of road ... to traverse the property" of the land company. It further explained the land company's intention "to donate and convey to the said railroad company a right of way 100 feet wide."[5] The 1891 agreement also required the railroad to

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[5] In pertinent part, the 1891 agreement between the railroad and the land company stated:

> "the said Chevy Chase Land Company in consideration of the agreement of the said railroad company hereinafter set forth, agrees to donate and convey to the said railroad company a right of way 100 feet wide....
>
> [a metes and bounds description] ***
>
> the above described parcel being a strip of land fifty feet wide on each side of the centre line of the [MSRC] through the lands of [the land company].
>
> And the said Land Company ... further agrees to donate and convey to the said Railroad Company for the purposes of a passenger and freight depot, and uses incident thereto, including side tracking, the following described parcel of land [a metes and bounds description]."

construct a passenger and freight depot on the tract of land that in the 1911 deed was denoted as "Parcel B," or, if the railroad did not construct the depot, the agreement [**26] provided that it would contribute $4,000 toward the cost of the land company's construction of the depot. The agreement was never recorded. After the agreement, the railroad constructed the railway but it never built the passenger and freight depot on Parcel B. The CFC concluded that "it is fairly clear that [the 1891 agreement] contemplated the conveyance of an easement." *Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 572.

Despite its conclusion that the 1891 agreement contemplated an easement, the CFC considered extrinsic evidence to conclude that the 1911 deed conveyed an interest in fee simple absolute. The CFC relied on a 1910 letter from a land company official referencing the conveyance to occur in the next year. The letter stated that

> "'the arrangement was that the Baltimore and Ohio Railroad Company pay to the Chevy Chase Land Company Four Thousand Dollars in cash, and in consideration of this payment, have conveyed to it, *all the property covered by its right of way contract* with the Land Company, entered into some years ago.'" (Emphasis added).

Chevy Chase Land Co. of Montgomery, 37 Fed. Cl. at 572. The CFC concluded that the letter "indicates" that the 1911 conveyance was to involve estates in land and not an easement. *Id.*

Even assuming, *arguendo*, that this letter was properly used to construe the interest that was conveyed in the deed, we fail to see the letter's significance in determining whether the right-of-way in the 1911 deed conveyed an estate or an easement. The use of the language in the letter "all the

property" is no more convincing as to intent to convey in fee simple than appellees' arguments rejected earlier relating to the description of the right-of- [**27] way as a "parcel of land." As we see it, the letter has less significance than the language in the deed describing Parcel A as a "parcel of land." The letter's statement of intent to "convey[] all the property covered by its right of way contract" can be interpreted as an intent to convey an easement just as convincingly as it may be interpreted to show an intent to convey an estate in fee simple absolute.

Appellees contend that the 1891 agreement should not be considered because it was "mutually abrogated, canceled and set aside" in the 1911 deed. Indeed, as discussed above, we need not turn to the 1891 agreement to reach our conclusion that an easement was conveyed in the 1911 deed. However, the abrogation language of the 1911 deed was "in consideration of the execution and delivery" of the new deed. Thus, it is relevant to the 1911 deed since it supplied consideration for the transaction. Moreover, the relevant portion of the deed states in full that the 1891 agreement is

> "mutually abrogated, canceled and set aside, *and* [MSRC] is hereby released and discharged from the obligation set forth in said contract, of erecting a passenger station to cost not less than Four Thousand (4,000) Dollars, or of contributing the sum of Four Thousand (4,000) Dollars toward the erection by ... [CCLC] of a passenger station [on Parcel B]; and [MSRC], *as is evidenced by its acceptance of this conveyance,* hereby releases [CCLC] from any obligation ... to erect or cause to be erected the passenger station aforesaid." (Emphasis added).

Thus, the 1891 agreement was abrogated only when the 1911 deed was properly executed and delivered, and that abrogation was linked in express contractual terms to the primary outstanding obligation of the 1891 agreement — to

either spend $4,000 on a [**28] passenger depot or pay $4,000 to MSRC for its own construction of a passenger depot.

This leads to an additional factor that courts consider in determining whether a fee simple estate or an easement is granted by a deed conveying a "right-of-way" — the amount of consideration paid for the deed. *Deed to Railroad Company as Conveying Fee or Easement*," Annotation, 6 A.L.R.3d 973, § 3, at 1038 (1966)("A factor which might be considered relevant in determining whether a deed to a railroad company should be construed as conveying a fee or easement is the amount of the consideration shown to have been paid by the company for the conveyance in question."). "The fact that the consideration paid was less than the value of a fee simple estate in the land, weighs strongly in favor of finding that they intended an easement." RESTATEMENT (THIRD) OF PROPERTY § 2.2, "Intent to Create a Servitude" cmt. g (Tentative Draft No. 1, 1989). We applied this principle in *Hodges*, *supra*, where we found that a deed to a railroad conveyed an easement. We noted that "[t]he purpose of the grantee was the building of a railroad, in which the grantor was willing to co-operate with the grantee *by a gift of this piece of right of way.*" *Hodges,* 178 Md. at 304, 13 A.2d at 340 (emphasis added). *See also Tamalpais Land & Water Co. v. Northwestern Pac. R. Co.*, 167 P.2d 825, 830 (Cal. Dist. Ct. App. 1946)("[T]he fact that no monetary consideration, or only nominal monetary consideration was paid for the grant is a factor of considerable importance indicating that the grant conveys an easement and not a limited fee."); *Weeks v. Missouri Pacific Railroad Company*, 505 S.W.2d 33, 37-38 (Mo. 1974)(finding that deed conveyed an easement interest based in part [**29] on evidence that defendant paid no consideration for the grant).

Appellees argue unconvincingly that the $4,000 the railroad paid to the land company was for an estate in fee simple of the land occupied by the right-of-way and not for release from the obligation in the 1891 agreement to expend or pay that amount for the construction of a passenger depot. They go on to contend that the $4,000 for Parcels A and B was more than nominal consideration, which they argue demonstrates that the deed conveyed an estate in fee simple. The CFC apparently accepted appellees' arguments, finding "more than nominal consideration," but it went on to conclude that the "consideration tendered does not militate in either direction." *Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 573-74. We disagree that the consideration was more than nominal and believe the lack of more than nominal consideration further militates toward construing the deed to convey an easement.

We must look no further than the deed itself to see that the consideration paid was nominal. The granting clause states that the property conveyed by the land company was "in consideration of FOUR THOUSAND (4,000) DOLLARS." As noted above, the deed provides that "in consideration of the execution and delivery of this Deed," the land company would release MSRC from its contractual obligation to pay $4,000 for the construction or the land company's construction of a passenger depot. Thus, the railroad paid $4,000 for release of a $4,000 contractual obligation *and* the conveyances of Parcel A and Parcel B, which were promised to be conveyed in the agreement of 1891. In lieu of its outstanding $4,000 contractual obligation, the consideration the railroad paid for the [**30] property was clearly nominal, which supports our interpretation of the deed as conveying an easement. In sum, we do not believe, as the appellees intimate and the CFC apparently accepted, that it was sheer coincidence that the

$4,000 the railroad paid for the 1911 deed was of the same amount as the railroad's outstanding $4,000 contractual obligation.

Finally, we are unconvinced by appellees' arguments that the Maryland statute in effect in 1911 suggests that the deed conveyed a fee simple estate. That statute declares that

> "[t]he word 'grant,' the phrase 'bargain and sell,' in a deed, or any other words purporting to transfer the whole estate of the grantor shall be construed to pass to the grantee the whole interest and estate of the grantor in the lands therein mentioned, unless there be limitations or reservations showing, by implication or otherwise, a different intent."

Md. Code (1904), Art. 21, § 12. Appellees contend that the statute applies because of the use of the term "grant" in the 1911 deed. As described above, the limitations in the 1911 deed are inherent in the grant of a right-of-way to a railroad company. Thus, "there [are] limitations or reservations showing, by implication or otherwise, a different intent" than to convey the whole estate of the grantor. *Id.* Our previous cases construing deeds to railroad companies containing the term "grant" nevertheless have concluded that the instruments conveyed easements and not estates in fee, notwithstanding the statute relied on by appellees. *See Brooke*, 244 Md. at 293, 223 A.2d at 603 (noting Article 21's "principle that the word 'grant' must be construed to pass all of the grantor's interest unless there are indications otherwise" but concluding nevertheless that deed to railroad using term "grant" conveyed an easement); *Richfield Oil Corp.*, *supra* (refusing to apply statute to deed using [**31] term "grant" to convey a "right of way"); *Hodges*, 178 Md. at 303-04, 13 A.2d at 339-40 (refusing to apply the statute when deed used term "grant" but language showed that grantor "gave the [railroad] a right of way," which conveyed

an easement); *Ross v. McGee*, 98 Md. 389, 394, 56 A. 1128, 1130 (1904)(holding that the statute "was never intended to apply to ... the granting of an easement").

4.

In conclusion, the use of the term "right-of-way" in the deed provides a strong indication that the railroad and the land company intended the 1911 deed to convey an easement. Our cases and the cases from other states consistently have construed deeds to railroads of "rights-of-way" as conveying easements and not estates in fee simple absolute. The language of the deed at issue in this case provides no reason to deviate from our previous cases. This is especially the case in light of the dual granting clauses of Parcel A, conveying a "right of way" and Parcel B, conveying the parcel "in fee simple." Finally, the circumstances of the deed confirm the conclusion that the deed conveyed an easement only. In particular, the fact that the railway had already been built and was in operation obviated any need for limiting language in the deed to indicate that less than a fee simple was being conveyed, and the nominal consideration given the land company by the railroad is a factor more consistent with the conveyance of an easement than an estate in fee simple absolute.[6]

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[6] We decline to entertain the Country Club's contention that it is the owner in fee simple absolute of a portion of the right-of-way that bisects two parcels of land conveyed to the Country Club by the land company in 1909. The Country Club did not argue before the United States Court of Federal Claims (CFC) that it owned in fee simple the segment now claimed. Rather, it contended that it had ownership "[p]ursuant to the doctrine of adverse possession, or alternatively, lost deed." *Chevy Chase Land Co. of Montgomery v. U. S.*, 37 Fed. Cl. 545, 587 (1997). It made no claim of ownership in the right-of-way by virtue of the 1909 deed, as it does here. *See Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 587-88. The Country Club first made the argument that the 1909 deed conveyed to it the segment of the right-of-way in fee simple absolute to

[**32] III. THE SCOPE OF THE EASEMENT

Since we have determined that the 1911 deed granted an easement, we must now consider the second certified question regarding the scope of the easement. We initially determine whether the express language of the deed limits the available uses of the right-of-way. After that determination, we consider the extent to which Maryland common law on railroad easements imposes any implied limits on use of the right-of-way that would [**33] prevent the right-of-way in the instant case from being used for a hiker/biker trail. This part then concludes with an examination of whether the use of the right-of-way for a hiker/biker trail unreasonably increases the burden of the easement on the servient estates.

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the Federal Circuit Court of Appeals; however, under its rules, that court will not entertain arguments not raised below. *See Jay v. Secretary of DHHS*, 998 F.2d 979, 983 n.4 (Fed Cir. 1993). Therefore, even if we were to entertain the Club's contention, that court nevertheless properly may refuse to consider that aspect of our decision in resolving the ultimate question of whether an unconstitutional taking occurred. Moreover, the certified questions to this Court do not seek an interpretation of the 1909 deed to the Country Club.

Furthermore, even if we were to entertain the Country Club's contention, the Country Club would face a difficult if not insurmountable hurdle in attempting to overcome the fact that the deed under which it claims title contains a metes and bounds description of the land that does not include any portions of the right-of-way at issue here. Even if we agreed with its contention, the Country Club's claim would ultimately be unsuccessful because our conclusions in Parts III and IV that the trail use is within the scope of the easement which has not been abandoned.

We therefore decline to exercise our discretion under Maryland Code (1974, 1998 Repl. Vol.), Courts & Judicial Proceedings Article, § 12-604, to rephrase the certified question to entertain the Country Club's argument that the 1909 deed conveyed to it a portion of the right-of-way in fee simple absolute.

A. Interpretation of the 1911 Deed

Appellants contend that the proposed interim use of the right-of-way as a hiker/biker trail is beyond the scope of the easement. Instead of the language of the deed, appellants emphasize the circumstances at the time of the original agreement between the railroad and the land company in 1891, contending that the "evidence is clear" that the land company intended that the easement was for purposes of freight railroad only. The land company cites the *Brooke* and *D.C. Transit I* decisions as support for its view that when a right-of-way is conveyed to a railroad, it is *ipso facto* restricted to railroad uses. Appellees, on the other hand, emphasize the deed itself, which contains no express limitations on the right-of-way conveyed. They contend that the easement was for a right-of-way to be used for general transportation purposes and that its use as a recreational trail is consistent with those purposes and imposes no additional burden on the servient estates.

We agree with appellees that the primary consideration in construing the scope of an express easement is the language of the grant. "[T]he extent of the rights [of an easement acquired by express grant] must necessarily depend upon a proper construction of the conveyance or that part of it by which the easement was created." *Parker v. T & C Dev.* [**34] *Corp.*, 281 Md. 704, 709, 381 A.2d 679, 682 (1978)(quoting *Buckler*, 221 Md. at 537, 158 A.2d at 322). *See also Reid v. Washington Gas Lt. Co.*, 232 Md. 545, 549, 194 A.2d 636, 638 (1963)(stating that the "scope of the easement is to be determined from the language of the grant"); 4 POWELL ON REAL PROPERTY § 34.12[2], at 34-178 (1998 Supp.)(observing that courts interpreting easements conveyed by express grant "stress the primary control exercised by the language of the creating conveyance" (footnote omitted)).

No language in the deed in the instant case suggests that the right-of-way was limited to railroad purposes only (and much less so to *freight* railroad purposes, as the land company contends). The deed conveyed a "free and perpetual right of way." The use of the terms "free" and "perpetual" provide a clear indication that few, if any, conditions were intended to be placed on the railroad's use of the right-of-way. "[F]ree" is defined as "[n]ot [being] subject to [the] legal constraint of another." BLACK'S LAW DICTIONARY 663 (6th ed. 1990). The use of the term "perpetual" clearly indicates that the easement was intended to be of indefinite duration and, particularly when combined with the term "free," suggests that the use of the easement was to be dynamic, *i.e.*, adaptable to the evolving circumstances and transit needs of those intended to benefit from the right-of-way — in particular the general public whom the land company was attempting to attract to the areas served by the railroad. The language making the easement transferable to "successors and assigns" further supports a broad construction of the deed language.

Unlike many of the grants of easements that we have addressed in the past, the deed [**35] in the instant case does not suggest any limit on the use of the right-of-way. It is clear that a right of passage was granted, and, as noted above in Part II.C.3, the circumstances clearly indicate that the original instrumentality was a railroad. But nowhere in the granting clause or elsewhere in the deed does the language suggest that a railroad was the only instrumentality for use of the perpetual right-of-way. For example, nowhere does language "for railroad purposes" appear, and there are no other express limitations on the use of the right-of-way. *Cf. Brooke*, 244 Md. at 294, 223 A.2d at 603 (concluding that deed language "*for railroad purposes*" limits scope of right-of-way). Even if we consider the 1891 agreement to

convey the right-of-way to the railroad, that agreement includes no express limitations; it states only that the agreement was made "in contemplat[ion of] the construction of a line of road ... to traverse the property" of the land company. As the Minnesota Supreme Court observed in addressing the scope of an easement granted to a railroad:

> "[N]one of the deeds expressly limit the easement to railroad purposes, provide that the interest conveyed terminates if use for railroad purposes ceases, or provide that the easement would exist only for so long as the right-of-way was used for railroad purposes. While the grantors were undoubtedly aware that a railroad would be constructed on the land, none of the deeds limit the use to railroad purposes."

State by Wash. Wildlife Preservation v. State, 329 N.W.2d 543, 546 (Minn.), *cert. denied* 463 U.S. 1209, 103 S.Ct. 3540, 77 L.Ed.2d 1390 (1983). In sum, it seems undisputable that the deed sweeps broadly by conveying an interest that is "free and perpetual" and making [**36] it freely transferable to "successors and assigns."

While the deed presents no express limitations on the use of the right-of-way, that does not end our analysis. Keeping in mind the broad language in the grant, we must determine whether the appellees have the right to substitute, at least for the interim, the use of the right-of-way as a recreational trail for the previous use of the right-of-way as a railroad corridor. We must consider whether the use of the right-of-way as a hiker/biker trail is of the same quality of use as anticipated in the original grant and whether it imposes any unreasonable new burdens on the dominant tenement. Before analyzing those questions, we note that because of the broad language of the grant any doubts about its use will be resolved in favor of the grantee, *i.e.*, the railroad:

> "If the grant contains no limitations, the court will attempt to discern what the parties would have reasonably expected, and will usually be generous in its interpretation. The language of the easement can grant to the easement holder a good deal of discretion in the use of the easement or limit the use very narrowly; if the grant is not clear, the court will interpret the scope of the easement in favor of 'free and untrammeled use of the land.'" (Footnotes and citations omitted).

7 THOMPSON ON REAL PROPERTY § 60.04(a), at 451 (Thomas ed.1994). *See also Washington Gas Lt. Co.*, 232 Md. at 549, 194 A.2d at 638 ("[T]he scope of the easement is to be determined from the language of the grant and any doubtful language must be resolved in favor of the grantee.").[7]

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[7] We disagree with the land company that our decisions in *East Wash. Railway v. Brooke*, 244 Md. 287, 223 A.2d 599 (1966), *D. C. Transit Systems v. S. R. C.*, 259 Md. 675 270 A.2d 793 (1970)(*D.C. Transit I*) and *D. C. Transit v. State Rds. Comm'n*, 265 Md. 622, 290 A.2d 807 (1972)(*D.C. Transit II*), that hold that the conveyance of a "right of way" to a railroad automatically indicates that the easement is restricted to railroad purposes only. In *Brooke*, in quoting the granting clause we emphasized (by use of italics) the language "*for railroad purposes.*" 244 Md. at 294, 223 A.2d at 603. The deed in the instant case includes no such limiting language. Moreover, the issue decided in that case was not related to the scope of the easement, but whether a fee simple or an easement had been conveyed. In *D.C. Transit I* and *D.C. Transit II* the scope of the easement was not at issue. Rather, *D.C. Transit I* raised the issue of whether a grant to a railroad conveyed a fee simple or easement in the land, and *D.C. Transit II* involved whether the easement had been abandoned. While there is some language observing that the use of the easement was for a railroad, whether the use was so limited was not raised. Regardless, the deed in issue in the *D.C. Transit* cases expressly limited the easement to the purposes of the railroad's charter. We therefore disagree with the land company as to the applicability of these cases.

[**37] B. Public Transit Use of the Right-of-Way

We have long accepted the view that railroads are public service corporations. *Whalen vs. Balto. & Ohio R. Co.*, 108 Md. 11, 21, 69 A. 390, 393 (1908). *See also Ma. & Pa. RR. Co.*, 224 Md. at 39, 166 A.2d at 250 (referring to a railroad as a "*quasi*-public corporation"); *Read v. Montgomery County*, 101 Md. App. 62, 68, 643 A.2d 476, 479 (observing that railroads operating the Georgetown Branch "function[] to promote the public welfare"), *cert. denied*, 336 Md. 301, 648 A.2d 203 (1994). In *Whalen,* we accepted the notion that a railroad is "'obliged to use its powers and privileges for the benefit of the public, and in aid of the public good.'" 108 Md. at 21, 69 A. at 393 (quoting the appellant's brief). Indeed, as the CFC acknowledged, the statutes in place at the time of the conveyance did not restrict railroad corporations to conducting rail service only. *See Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 585-86. For example, Maryland law empowered the legislature to "regulate, modify or change the control, use and estate of any rail road [**38] constructed by such corporation, in such manner as it may deem equitable towards the said corporation and *necessary to the accommodation of the public travel or use of the said rail road or rail roads.*" Md. Code (1860), Corporations Art., § 71 (emphasis added). *See also* Chapter 231 § 1 of the Act of 1882 (authorizing railroad to engage in telegraph business); Ch. 279 of the Acts of 1880 (railroad authorized to operate other railroads and works facilitating commerce). Because the public nature of the railroad business was obvious at the time of the 1911 deed, we must assume that the land company knew that its grant was subject to reasonable accommodations for the public use and that, if it wanted to limit the uses of the right-of-way to rail use only, it would have included appropriate limiting language in its deed.

We have long considered a railroad line as analogous to a public highway. *Whalen*, 108 Md. at 21, 69 A. at 393 ("A railroad is in many essential respects a public highway, and the rules of law applicable to one are generally applicable to the other."); *Hessey v. Capital Transit Co.*, 193 Md. 265, 272, 66 A.2d 787, 790 (1949)(observing that "a railroad company, organized and conducted for private corporate profit, ... devot[es] its property to the use of the public"). Just like highways, railroad lines are subject to public use as is evidenced by their common carrier obligations. And railroads historically have had the power of eminent domain, a power reserved only to the government and those the government has annointed. Thus, our cases interpreting the scope of public highways provide a solid framework upon which to construe the grant of a general use "right-of-way" [**39] to a railroad.

Our highway cases have construed easements for public highways as including within their scope changing means of transportation. In *Water Co. vs. Dubreuil*, 105 Md. 424, 66 A. 439 (1907), we explained that

> "we have been governed by the fact that such [electric railway] uses, of both streets and rural highways, were only new modes of travel and transportation, and the right, originally acquired, to use them was not simply for the then existing modes, but for all such as might arise in the ordinary course of improvement. It could therefore be presumed that such improved modes of travel and transportation were within the contemplation of the parties...."

105 Md. at 431, 66 A. at 441. About a decade earlier, in *Poole vs. Falls Road Ry. Co.*, 88 Md. 533, 41 A. 1069 (1898), we noted that the purpose of a highway easement is for "passing and repassing" and only when a use is "not incident to such right of passage" does it create an additional

servitude. 88 Md. at 537, 41 A. at 1071. We therefore concluded that the

> "test ... of what is a new use would seem to be found not necessarily in the nature of the structure nor in the number of the tracks but in the use itself; whether it is promotive of the objects and purposes for which the easement in the public was acquired."

Id. See also 5 RESTATEMENT OF PROPERTY § 484 (1944)("In ascertaining ... whether additional or different uses of the servient tenement required by changes in the character of the use of the dominant tenement are permitted, the interpreter is warranted in assuming that the parties to the conveyance contemplated a normal development of the use of the dominant [**40] tenement.").

The early decisions of this state adhere to the view that the purpose for which the public easement was acquired is the overriding factor in the analysis rather than the mode or instrumentality of use. In *Peddicord v. B., C. & E. M. R. R. Co.*, 34 Md. 463 (1871), we held that a right-of-way conveyed to a turnpike company could be used for a horse railway for passengers even though "it was not actually contemplated by any of the parties to the acquisition and grant." 34 Md. at 480-81. We recognized that the turnpike company had a perpetual easement over the highway, lasting "forever," and we observed that its conversion to a horse railway was an appropriate improvement "consistent with its character and purpose as a public highway." *Id.* Further, we concluded that the conversion to horse railway did not cause an additional burden on the land or operate to impair the incidental rights of the dominant tenement. *Id. See also Hodges v. Balto. Union P. Ry. Co.*, 58 Md. 603, 619 (1882)(similarly holding that a "horse railway is but one of the legitimate contingencies within the objects and purposes for which the street was dedicated to the public"). In *Koch v.*

North Ave. R. R. Co., 75 Md. 222, 23 A. 463 (1892) and *Green v. City & Suburban R.R. Co.*, 78 Md. 294, 28 A. 626 (1894), we extended the holdings in *Hodges* and *Peddicord* to electric railways, concluding that electricity was a normal development consistent with the purpose of public travel. *See also Lonaconing Ry. Co. vs. Consol. Coal Co.*, 95 Md. 630, 53 A. 420 (1902)(holding that the owner of the fee of a country road was not entitled to an injunction to prevent the building of an electric railway in the county [**41] because it was not an additional servitude).

In this regard, the law in Maryland is consistent with the law of other jurisdictions that recognize the public attributes of railroad lines. As the West Virginia Supreme Court of Appeals has observed,

> "railroads are not viewed strictly as private corporations since they are publicly regulated common carriers. Essentially, a railroad is a highway dedicated to the public use. This dedication imports to the railroad the status of a quasi-public corporation. *Eckington & Soldier's Home R. Co. v. McDevitt*, 191 U.S. 103, 24 S.Ct. 36, 48 L.Ed. 112 (1903); *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897). As such, the rights and duties of a railroad are in most instances determined by constant consultation with the public interest."

Marthens v. B & O Railroad Co, 289 S.E.2d 706, 711 (W. Va. 1982). *See also State by Wash. Wildlife Preservation*, 329 N.W.2d at 546 (quoting *Marhens*); *Lawson v. State*, 730 P.2d 1308, 1311 (Wash. 1986)("[R]ailroads must hold their property in trust for the public use."); *id.* ("A railroad is a public highway, created for public purposes."); *Faus v. City of Los Angeles*, 431 P.2d 849, 856 (Cal. 1967)(holding that right of way "primarily intended to provide public

transportation" that was initially used for electric railroad could be converted to motor bus transportation).

C. Compatibility of Trail Use with Prior Uses

As discussed above, the starting point for determining whether the current use of the Georgetown Branch as a hiker/biker trail is compatible with its prior use is the deed itself. [**42] The phrase "right-of-way" as used in the context of the grant is a "right belonging to a party to pass over land of another." BLACK'S LAW DICTIONARY 1326 (6th ed. 1990). Since the deed contains no limits on the use of the right-of-way, we apply the rule that "[a] grant in general terms of an easement of way will ordinarily be construed as creating a general right of way capable of use in connection with the dominant tenement for all reasonable purposes." 3 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 803, at 322 (3d ed. 1939)(footnote omitted).

We believe it indisputable that use of the right-of-way as a trail is consistent with its essential nature relating to the "pass[ing] over land of another" and is a reasonable use of a general right of way. Accordingly, the scope of the right-of-way in the instant case encompasses use as a hiker/biker trail. It follows from our cases that the fact that a recreational trail may not have been actually contemplated by the parties when the deed was conveyed in 1911 is not outcome determinative. Rather, we assume that the parties anticipated that the use of the right-of-way would conform over time to the reasonable demands of the public. Just like the highway easement in *Peddicord* lasted "forever," the deed in this case was made "perpetual," and although use as a hiker/biker trail "was not actually contemplated by any of the parties to the acquisition and grant, ... it may be said to have been within the legal contemplation of all that it was to be used for all purposes by which the object of its creation, as a public highway, could be promoted." *Peddicord*, 34

Md. at 480-81. In other words, the use of the right-of-way as a public trail was legally [**43] contemplated by the parties to the 1911 deed and is of the same nature as the public railway in existence for some 90 years, *i.e.*, the use involves the passage over land consistent with the needs of the public. The 1891 contract and 1911 deed both clearly anticipated that the right-of-way would be put to use for public transportation, as evidenced by the plans to build a "passenger station" (the 1911 deed) or a "freight and passenger depot" (the 1891 agreement).

Use of the right-of-way as a hiker/biker trail constitutes a change in instrumentality consistent with the essential purpose anticipated at the time of the original grant in 1911 — passage through Silver Spring, Chevy Chase, and Bethesda. The primary change is one of instrumentality from railcars to bikes and walking, and our highway cases make clear that changes in mode of use are presumed to be within the contemplation of the parties. Indeed, the state legislature has seen fit to define "highway" as including "bicycle and walking paths." Md. Code (1977, 1993 Repl. Vol., 1998 Supp.), Transportation Art., § 8-101(i)(1). *See also* the cases cited in Part III.B., *supra*, and *Washington Gas Lt. Co.*, 232 Md. at 551, 194 A.2d at 639 (holding that the replacement of an existing pipe to a larger pipe was within the scope of the easement because the change "involved merely an alteration of the *instrumentality* of the easement")(emphasis in original); *Tong v. Feldman*, 152 Md. 398, 136 A. 822 (1927)(similar holding). As the South Dakota Supreme Court stated, "the Railroad has transferred the right-of-way to the State for use as a public highway. Hikers, bikers, skiers, and snowmobilers will use the right-of-way, and, as such, the right-of-way will [**44] continue to be used as a public highway compatible and consistent with its prior use as a public railway." *Barney v.*

Burlington Northern R. Co., 490 N.W.2d 726, 732 (S.D. 1992), *cert. denied sub nom. Kaubisch v. South Dakota*, 507 U.S. 914, 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993).

D. The Reasonableness of the Burden

We must next consider whether use of the right-of-way as a hiker/biker trail unreasonably increases the burden on the underlying fee simple estates. It is "the generally accepted rule that since an easement is a restriction upon the rights of the servient property owner, no alteration can be made by the owner of the dominant estate which would increase such restriction except by mutual consent of both parties." *Washington Gas Lt. Co.*, 232 Md. at 548-49, 194 A.2d at 638. *See also W. Arlington L. Co. v. Flannery*, 115 Md. 274, 279, 80 A. 965, 967 (1911)("[B]ecause an easement is a restriction upon the rights of property of the owner of the servient estate ... no alteration can be made by the owner of the dominant estate, which would be to increase such restriction."). As we explained in *Washington Gas Lt. Co.*, the test used to determine whether the restriction on the servient estate, *i.e.*, the burden imposed, is

> "whether the change is so substantial as to result in the creation and substitution of a different servitude from that which previously existed. In other words, if the alteration is merely one of quality and not substance there will be no resulting surcharge to the servient estate." (Citation omitted).

[**45] *Washington Gas Lt. Co.*, 232 Md. at 549, 194 A.2d at 638.

It is self-evident that the use of the right-of-way as a transportation corridor for walking, biking, and other transportation purposes, including its possible use in the future for light rail, imposes no new burdens on the servient tenements and does not result in the "substitution of a

different servitude from that which previously existed." *Id.* The use to which the County proposes to use the right-of-way is reasonable and consistent with a grant of a right-of-way "in general terms." *See* 3 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 803, at 322 (3d ed. 1939). Indeed, "[r]ecreational trail use of the land is compatible and consistent with its prior use as a rail line, and imposes no greater burden on the servient estates." *State by Wash. Wildlife Preservation*, 329 N.W.2d at 547.

In comparison to our public highway cases that have permitted a change in use from a highway to a horse or an electric railway, the change of use proposed in the instant case is considerably less burdensome. That use of the right-of-way by bikers and walkers poses less of a burden than the use required by a freight train is obvious. Bikers and walkers, even in large groups, simply cannot be said to be more burdensome than locomotive engines pulling truck-sized railroad cars through the corridor. "The legitimate burden presented by frequent, loud, and even dangerous, railroad use far outstrips any burden presented by foot or bicycle traffic." *Lawson*, 730 P.2d at 1320 (Utter, J., dissenting). *See also Barney,* 490 N.W.2d at 733 (observing that conversion from railway to recreational trail poses "[n]o greater burden ... on the servient estate.") Moreover, the conversion from a railway to a trail [**46] is consistent with the general rule of property law that easements are non-exclusive. *Wagner v. Doehring,* 315 Md. 97, 104, 553 A.2d 684, 687 (1989)("[T]he holder of a right-of-way does not ordinarily have exclusive use of the way."). On the other hand, an easement held by a railroad tends to exclude use of the easement by the owner of the servient tenement. *See, e.g., State v. Preseault,* 652 A.2d 1001, 1003 (Vt. 1994)("[T]he holder of a railroad easement enjoys the right to the exclusive occupancy of the land, and has the right to

exclude all concurrent occupancy in any mode and for any purpose."); *State ex rel. Fogle v. Richley*, 378 N.E.2d 472, 475 (1978)("There can be no greater burden upon property than that which results from [a railroad's] appropriation of a right to exclusive use."); *Missouri-Kansas-Texas Railroad Company v. Freer*, 321 S.W.2d 731, 737 (Mo. Ct. App. 1958)("[S]omewhat as a matter of public policy, the holder of a railway right of way easement can ... exclude the owner of the servient tenement.")(footnote omitted). Thus, the change in use in this case actually decreases the burden on the servient tenement because, *inter alia*, the shift is from an exclusive to a non-exclusive use. In this case, the owners of the underlying fee estates with property abutting the Georgetown Branch have access to a corridor to which they did not have access prior to conversion to a trail. *See also* Marc A. Sennewald, *The Nexus of Federal and State Law in Railroad Abandonments*, 51 VAND. L. REV. 1399, 1411 (1998)(observing that railroad right-of-ways are "exclusive use easement[s]" and that "railroad easements are among the most burdensome of easements, especially as compared to easements used for interim recreational trails"); Charles H. [**47] Montange, *Conserving Rail Corridors*, 9 TEMP ENVTL. L. & TECH. J. 139, 158 (1991)(contending that the shift in use "from a burdensome form of public highway — rail — into a less burdensome form — trail" is "*de minimis*")(footnote omitted).

The fact that the right-of-way may be used for recreational as well as transportation purposes has no bearing on our analysis, since the "recreation" involved — biking and hiking — consists of the enjoyment one may have in transporting oneself. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2430 (Unabridged ed., 1986)(defining "transportation" as involving "travel from one place to another"). Indeed, that hiking and biking may

be recreational in addition to fulfilling transportation needs is not all that different from the enjoyment that some derive from driving a car or even riding a train; the enjoyment that some derive from those activities does not detract from their essential character as transportation-related. Indeed, by the very nature of the right-of-way — a confined, narrow strip of land — the "recreational" use is limited to those uses involving *transportation* itself, including biking, running, and walking, each of which involves moving from one place to another. *Cf. D.C. Transit I*, 259 Md. at 688, 270 A.2d at 800 (observing that the useful purpose of "a strip of land 80 feet wide" is limited); *Ma. & Pa. RR.*, 224 Md. at 36-37, 166 A.2d at 248-50 (making a similar observation).

E. Conclusion

The right-of-way in the instant case is affected by the public interest. That railroad [**48] companies are in the nature public service corporations has been a constant theme of statutory and case law, and we have recognized the public nature of such easements in our jurisprudence regarding the scope of public easements well before the conveyance of the deed in the instant case. *See* Part III.B., *supra*. The public policies have been evidenced by the comprehensive federal regulatory scheme that governs many aspects of the railroad business (*see* Part IV. A.2, *infra*), by a railroad's status as a common carrier, and by state regulation, even at the time the right-of-way was deeded to the railroad in this case. *See generally Bensen vs. Public Service Comm.*, 141 Md. 398, 118 A. 852 (1922).

Federal and state laws explicitly recognize the value to the general public of railroad rights-of-way. The federal Rails-to-Trails Act, which serves as the impetus for this lawsuit, is an obvious example of the perceived public value of railroad corridors. *See* 16 U.S.C. § 1247(d); *Preseault*, 494 U.S. at 18, 110 S.Ct. at 925, 108 L.Ed.2d at 17 (quoting

H.R. REP. NO. 98-28, at 8 (1983)(upholding the Act as a legitimate exercise of congressional power and observing that "Congress intended 'to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use'"). The Maryland legislature has also recognized the public value of railroad rights-of-way. *See* Md. Code (1974, 1997 Repl. Vol.) Natural Resources Art., § 5-1010(a)(2)("Abandoned railroad corridor property is a unique source of land corridors that are, in many cases, suitable for recreational trails."); Md. Code (1977, 1993 Repl. Vol.), Transportation Art., § 7-901 (authorizing the state to acquire railroad [**49] corridor property). Thus, our holding furthers, rather than frustrates, legitimate state and federal policy interests.

Our conclusion here also is consistent with the decisions of courts in other states that have held that trail use falls within the scope of the right-of-way conveyed to the railroad. As the Supreme Court observed in *Preseault*, some rights of way "are held as easements that do not even as a matter of state law revert upon interim use as nature trails." 494 U.S. at 16, 110 S.Ct. at 924, 108 L.Ed.2d at 16 (citation omitted). For example, in *State by Wash. Wildlife Preservation*, *supra*, the Minnesota Supreme Court construed a grant of a right-of-way to a railroad that included no express limitations. The court concluded that "[u]se of the right-of-way as a recreational trail is consistent with the purpose for which the easement was originally acquired, public travel, and it imposes no additional burden on the servient estates." 329 N.W.2d at 545. *See also Barney*, 490 N.W.2d at 732-33 (similar holding).

A different outcome was reached by the Supreme Court of Washington in *Lawson*, *supra*. That court held that a right-of-way conveyed to a railroad reverted to the fee

owners when it was conveyed to the local government for use as a recreational trail. The *Lawson* court's decision, however, turned on its acceptance of the deeds at issue as being expressly limited to "railroad purposes only." 730 P.2d at 1312. That court stated: "[W]e hold that a change in use from 'rails to trails' constitutes abandonment of an easement *which was granted for railroad purposes only.*" *Lawson*, 730 P.2d at 1313 (emphasis added). While [**50] appellants allege that the right-of-way in the instant case was for railroad purposes only, as discussed above, the language of the deed simply provides no support for its contention. The deed in this case is similar to the deed construed in *State by Wash. Wildlife Preservation, supra*, and therefore that case provides the more persuasive authority.

In sum, the deed in this case conveyed the general use of a right-of-way. The grantee railroad is obligated under statutory and common law to operate and use its assets for the furtherance of the general public welfare. This obligation runs to its rail corridors, which, in effect, are public highways that must conform in their use to new modes of transportation so long as they are reasonable and are no more burdensome to the servient estate. Finally, the conversion of a railway used for freight to a footpath is consistent and compatible with the prior railway use. As the Minnesota Supreme Court stated:

> "The right-of-way is still being used as a right-of-way for transportation even though abandoned as a railroad right-of- way. Recreational trail use of the land is compatible and consistent with its prior use as a rail line, and imposes no greater burden on the servient estates. The use is a public use, which is consistent with the purpose for which the easement was originally acquired. State and federal statutes encouraging the conversion of

railroad rights-of-way to recreation trails also support our holding."

State by Wash. Wildlife Preservation, 329 N.W.2d at 547.

IV. ABANDONMENT

The final issue we address is the certified question regarding whether the railroad's [**51] easement has been abandoned. We initially observe that appellants' arguments on abandonment appear to be predicated on their contention that the scope of the easement was for railroad purposes. The Country Club contends, for example, that various facts show "that the Railroad was not going to be using this property *for railroad purposes again*." (Emphasis added). Along the same lines, the land company contends that the railroad "had no intent to continue *railroad use*." (Emphasis added). These arguments of the appellants in part reflect the overlapping nature of the questions of scope and abandonment. As we stated in *Peck v. Baltimore County*, 286 Md. 368, 410 A.2d 7 (1979):

> "The use to which the County proposes to put the land in question is relevant to whether it has an intention to abandon. If it were to be found that the contemplated use were within the scope of the easement this could be evidence of a lack of intention to abandon. If the contemplated use were not within the scope of the easement, then unless it be found that some other permitted use is being made, it is *possible* that an intention to abandon might be found, although if the contemplated use is found not to be within the scope of the easement this would not necessarily establish an intention to abandon." (Emphasis in original).

286 Md. at 377-78, 410 A.2d at 11.

As *Peck* suggests, in the instant case if the scope of the easement were limited to railroad purposes, then an intent to abandon railroad use could indicate an intent to abandon the easement. However, the converse is also true. If the easement is not limited in its scope to railroad purposes, then, in order for there to be an abandonment, the party alleging abandonment must show more than an intent to abandon railroad service. In *Ma. & Pa. RR.* [**52] *Co.*, we addressed whether an easement held by a railroad had been abandoned and explained:

> "The general rule is that the right and title to a *mere* easement in land acquired by a *quasi*-public corporation, either by purchase, condemnation or prescription, for a public purpose is dependent upon the *continued use of the property for that purpose*, and when such public use is abandoned the right to hold the land ceases, and the property reverts to its original owner or his successors in title." (Emphasis in original and added).

224 Md. at 39, 166 A.2d at 250.

Since we have held that the scope of the easement permits use of the right-of-way as a trail, the facts indicating that the railroad did not intend to resume *rail service* prove unhelpful to appellants' abandonment arguments. We held in Part III that the trail use, in the words of *Ma. & Pa. RR. Co.*, is a "continued use of the property for th[e] purpose" for which it was conveyed, *i.e.*, transit uses. *Id.* To the extent that appellants' abandonment arguments rest on their contention that the scope of the easement is limited to railroad purposes, they fail to meet their burden of proving abandonment.

Nevertheless, we will assume, *arguendo*, that appellants' allegations that the right-of-way has been abandoned does not hinge upon the issue of the scope of the easement. We

therefore begin with an examination of Maryland law on easement abandonment and a description of the federal regulatory scheme, which is crucial to an understanding of the various actions the railroad took in the years immediately preceding its [**53] conveyance to the County.

A. State Law "Abandonment" Versus Regulatory "Abandonment"

1.

In *Vogler v. Geiss*, 51 Md. 407 (1879), our predecessors set forth the standard by which to measure whether an easement has been abandoned. In that case, we said:

> "It is now very well settled, by authorities of the highest character, that a party entitled to a right of way or other mere easement in the land of another may abandon and extinguish such right by acts *in pais*, and without deed or other writing. The act or acts relied on, however, to effect such result, must be of a decisive character; and while a mere declaration of an intention to abandon will not alone be sufficient, the question, whether the act of the party entitled to the easement amounts to an abandonment or not, depends upon the intention with which it was done, and that is a subject for the consideration of the jury. A cesser of the use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time." (Emphasis in original and citations omitted).

Vogler, 51 Md. at 410. *See also D. C. Transit v. State Rds. Comm'n*, 265 Md. 622, 627, 290 A.2d 807, 810 (1972)(*D.C. Transit II*)("The rule of *Vogler* has been approved and followed."); *Brooke, supra*; *1.44 Acres of Land*, 304 F. Supp. at 1069 (quoting *Vogler*).

Since there is rarely direct evidence of an intent to abandon, the question of abandonment hinges upon the manifestations (or lack thereof) of an intent to abandon, and "the issue in most cases is reduced to the question of what factors or circumstances are [**54] sufficient to justify an inference that there existed an intent to abandon." *What constitutes abandonment of a railroad right of way,* 95 A.L.R.2d 468, § 2, at 470 (1964). No single factor is usually sufficient to establish the inference of abandonment. *Id.* Rather, *Vogler* and its progeny make clear that non-use alone is insufficient to show an intent to abandon; there must be an act or a combination of acts that unequivocally demonstrate an intention to abandon. *See Shuggars v. Brake*, 248 Md. 38, 46, 234 A.2d 752, 758 (1967)("An easement may not be lost unless there is some act clearly and unequivocally indicating an intention to abandon it, and mere non-user is not enough."); *Cooper v. Sanford Land Co.*, 224 Md. 263, 266, 167 A.2d 602, 604 (1961)("[T]wo elements are necessary to show an abandonment, namely, an intention to abandon, and an overt act, or an omission to act, by which such intention is carried into effect."); *Ma. & Pa. RR. Co.*, 224 Md. at 40, 166 A.2d at 250 ("[T]he law is well settled that the intent to abandon may be shown by the acts of a party indicating such an intention."); *Klein v. Dove*, 205 Md. 285, 295, 107 A.2d 82, 87 (1954), *citing Lichtenberg v. Sachs*, 200 Md. 145, 156, 88 A.2d 450, 455 ("Mere non-user of a right of way is not necessarily an abandonment of it."); *Knotts v. Summit Park Co.*, 146 Md. 234, 240, 126 A. 280, 282 (1924)("[W]here a right of way is acquired by grant, as in this case, it cannot be lost by mere non-user, for however long a time, unless such non-user is accompanied by some act indicating clearly and unequivocally an intention of the grantee to abandon it."); *Green v. Pennsylvania R. Co.*, 141 Md. 128, 132, 118 A. 127, 128 (1922)("Intention is an essential element of abandonment."); *Canton Co. vs. Balto.*

& Ohio [**55] *R. Co.*, 99 Md. 202, 218, 57 A. 637, 638-39 (1904)(observing that nonuse "will not *per se* operate as abandonment, unless there is some decided and unequivocal act of the owner inconsistent with the continued existence of the easement"); *Glenn v. Davis*, 35 Md. 208, 217 (1872)("Unquestionably, the law is well settled that an easement may be abandoned by the acts of a party indicating such an intention.").[8]

Finally, while the determination turns on the acts of the holder of the easement indicating an intention to abandon, it is well-settled that "the burden of proving abandonment rests on the one who asserts or relies on it." *Ma. & Pa. RR. Co.*, 224 Md. at 40, 166 A.2d at 250. *See also D. C. Transit I*, 259 Md. at 691, 270 A.2d at 801; *Ayres v. Hellen*, 235 Md. 258, 261, 201 A.2d 509, 510 (1964); *Klein*, 205 Md. at 295, 107 A.2d at 87.

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[8] An easement obtained through prescriptive use, however, may be abandoned through non-use alone, if the non-use lasts the prescriptive period. *See Browne v. M. E. Church*, 37 Md. 108, 119 (1872)("[Since] the right ... had been acquired ... by *adverse user*, for twenty years[,] its *non-user* for a like space of time, would extinguish any right they acquired ... because such *cesser* to use the road, would afford legitimate presumption of a release of the right." (Emphasis in original.)); *Wright vs. Freeman*, 5 H. & J. 467, 476-77 (1823)("adversary user of a right of a way over the lands of another for twenty years, shall be a sufficient foundation to presume that the right originated in grant, it must follow, upon every principle, that the non-user of the right may be extinguished"); *Cherry v. Stein*, 11 Md. 1, 21-22 (1858)(discussing holding in *Wright vs. Freeman, supra*, that "the adversary user of a right of way over the lands of another for twenty years, would be a sufficient foundation to presume, that the right originated in a grant; and consequently, for the purpose of quieting possession, it must follow that twenty years of non-user of the right would extinguish it, by creating a presumption of its release.").

In several of our previous cases, we have upheld findings that an easement has been abandoned, concluding that the necessary unequivocal acts were present. For example, in [**56] *Stewart vs. May*, 119 Md. 10, 85 A. 957 (1912), we affirmed a finding that an easement had been abandoned when no use had been made of it for "at least twelve years" and, among other factors, the holder of the easement "had built over the [easement] in such way as to make it impossible for them to enjoy [it]." 119 Md. at 19, 85 A. at 960. In *Cityco Realty Co. v. Phila., B. & W. R. Co.*, 158 Md. 221, 148 A. 441 (1930), we concluded that an easement had been abandoned in an action brought to compel the railroad to construct and maintain a farm crossing that had not been used for more than 20 years before the acquisition of land by the plaintiff and where the land had been conveyed without reservation. And in *Hagerstown & F. Rwy. Co. vs. Grove*, 141 Md. 143, 118 A. 167 (1922), we upheld a finding of abandonment after a railroad had removed its tracks from the right-of-way four years after it was constructed and after it had begun using another route.

In deciding the certified question, we therefore must decide whether there has been a sufficiently "decided and unequivocal act of the owner inconsistent with the continued existence of the easement." *Canton*, 99 Md. at 218, 57 A. at 639. Before examining the facts to see if any one of them or taken together they are sufficiently decisive to support a finding of abandonment, it is necessary to review the federal regulatory scheme under which the railroad operates.

2.

Interstate rail carriers have long been subject to comprehensive federal regulation as [**57] common carriers. *See Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elev. Co.*, 226 U.S. 426, 433-35, 33 S.Ct. 174, 174-75, 57 L.Ed. 284, 286-87 (1913). Under the Interstate

Commerce Act, the ICC[9] oversees the common carrier obligations of freight railroads operating in interstate commerce. *See* 49 U.S.C. § 11101(a)(requiring railroads subject to ICC jurisdiction to "provide ... service on reasonable request"). Furthermore, railroads subject to ICC jurisdiction may construct or acquire new railroad lines only if the ICC finds that public convenience and necessity require or permit their acquisition or construction. 49 U.S.C. § 10901. Federal law also controls a railroad's abandonment of its railroad lines or the discontinuation of rail service over any part of its lines. 49 U.S.C. § 10903 (requiring a railroad to obtain a certificate of abandonment or discontinuance prior to taking either action). Permission for abandonment or discontinuation also depends upon an ICC finding of "public convenience and necessity." 49 U.S.C. § 10903 (a)(2). The ICC must deny the abandonment application if it "fails to find public convenience and necessity." 49 U.S.C. § 10903(b)(1)(B). In making a finding of public convenience and necessity, the ICC must consider "whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development." 49 U.S.C. § 10903(a)(2). The Supreme Court has concluded that the "public convenience and necessity" standard involves a balancing test:

> [**58]"The benefit to [the railroad] of the abandonment [should be balanced] against the inconvenience and loss to [the public]. Conversely, the benefits to particular communities and commerce of continued operation must

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[9] On January 1, 1996, the ICC ceased to exist and its duties were transferred to the Surface Transportation Board (STB), in the Department of Transportation. Act of Dec. 29, 1995, Pub. L. No. 104-88, 1995 U.S.C.C.A.N. (109 Stat.) 803. Since the "ICC Termination Act of 1995" had not taken effect at the times relevant to this decision, we shall refer only to the ICC, although the ICC's powers now reside with the STB.

> be weighed against the burden thereby imposed upon other commerce.... Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests.... In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the [A]ct does not make issuance of the [abandonment] certificate dependent upon a specific finding to that effect."

Colorado v. United States, 271 U.S. 153, 168-69, 46 S.Ct. 452, 456, 70 L.Ed. 878, 885-86 (1926). When the ICC issues an order finding that public convenience and necessity allow a carrier to abandon a line, that order is permissive, not compulsory, and the railroad may choose not to exercise its permission to abandon. *See Consolidated Rail Corp. v. Surface Transp. Bd.*, 93 F.3d 793, 797-99 (D.C. Cir. 1996). Moreover, until abandonment has been consummated, the ICC "may at any time on its own initiative" reconsider its grant of permission to abandon if it finds "material error, new evidence, or substantially changed circumstances." 49 U.S.C. § 10327(g)(1).

Congress enacted the Rails-to-Trails Act in 1983 against this background of federal regulation over the abandonment of railroad rights-of-way. 16 U.S.C. § 1247(d). The Rails-to-Trails Act amended the National Trails System Act by adding to it subsection (d), which in essence provides a third option for railroads in lieu of an application to either abandon the line or discontinue service. That section provides in pertinent part:

> [**59]"[I]n furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service ... in the case of interim use of any established railroad rights-of-way ... such interim use

> shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use."[10]

The Act was the "culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." *Preseault*, 494 U.S. at 5, 110 S.Ct. at 918, 108 L.Ed.2d at 9. "Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable." *Preseault*, 494 U.S. at 19, 110 S.Ct. at 926, 108 L.Ed.2d at 18-19. The statute provides a means by which railroads can escape from the economic burden of maintaining unprofitable railroad lines without loss of the right-of-way, while using those [**60]

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[10] The Fifth Amendment takings claim arises out of the 16 U.S.C. § 1247(d) language declaring that "interim use of any established railroad rights-of-way ... shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." In *Preseault v. ICC*, 494 U.S. 1, 16-17, 110 S.Ct. 914, 924, 108 L.Ed.2d 1, 17 (1990), the Supreme Court held that, if the interim trail use agreement results in a taking of a state property interest, the owner of the taken property has a claim under the Tucker Act, 28 U.S.C. § 1491(a)(1)(1994, Supp. II 1996). It is the Tucker Act claim that the appellants are pursuing in this case.

rights-of-way for the public benefit in the interim. Potential interim trail use is considered prior to abandonment of rail lines, and if an agreement for interim trail use is consummated, abandonment is foregone.

The rails-to-trails provisions are triggered only when the railroad files an application with the ICC proposing to abandon the line. *See* 49 C.F.R. § 1152.29 (requiring the entity interested in acquiring the right-of-way to participate when the rail line is "proposed to be abandoned"); *Birt v. Surface Transp. Bd.*, 90 F.3d 580, 581-82 (D.C. Cir. 1996)(observing that § 1247(d) may come into play when "a railroad seek[s] to abandon a line"). If the ICC finds the Act applicable, it will delay the effective date of the abandonment order pending negotiations between the proposed trail sponsor and the railroad. 49 C.F.R. § 1152.29(c). The ICC issues a Certificate of Interim Trail Use or Abandonment (CITU)[11] allowing the railroad to negotiate an agreement with the public or private organization willing to assume responsibility for the right-of-way. The certificate may be issued only when the circumstances are otherwise such that "the public convenience and necessity ... permit abandonment." 49 C.F.R. § 1152.29(b)(1)(ii)(B).

If an agreement on trail use is reached with a state or local government or private group, § 1247(d) treats the interim trail use as a discontinuance of service, in which ICC jurisdiction is preserved over the right-of-way, rather than an abandonment that would [**61] terminate ICC jurisdiction

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[11] More accurately, the ICC will issue either a Notice of Interim Trail Use (NITU) or a Certificate of Interim Trail Use or Abandonment (CITU), depending on the nature of the abandonment proceedings; the difference is not relevant for our purposes since their effect is the same. In the instant case, the ICC issued a CITU.

and cause any right-of-way held as an easement to revert to the owner of the underlying estate in fee simple. According to federal regulations, the issuance of the CITU "[p]ermit[s] the railroad to discontinue service, cancel tariffs, and salvage track and material consistent with interim trail use and rail banking." 49 C.F.R. § 1152.29(c)(1). Furthermore, "[t]he CITU will indicate that interim trail use is subject to future restoration of rail service." 49 C.F.R. § 1152.29(c)(2). In several cases, the ICC has ordered that service be restored over rail lines that had previously been converted to trails under 16 U.S.C. § 1247(d). *See Norfolk and Western Railway Company — Abandonment between St. Marys and Minster in Auglaize County, OH,* 9 I.C.C.2d 1015, 1017 (1993); *Missouri Pacific Railroad Company — Abandonment Exemption — in St. Louis County, MO*, Dkt. No. AB-3 (Sub-No. 98X)(Surface Trans. Bd., April 18, 1997); *Iowa Power, Inc. — Construction Exemption — Council Bluffs, IA*, 8 I.C.C.2d 858 (1990). Thus, during the interim the rail corridor is held in a national "rail bank," over which federal regulators retain jurisdiction for the possibility of future rail use.

In addition to the need to comply with federal laws and regulations governing the cessation of railroad service and the potential abandonment of railroad property, Maryland law governs a railroad's disposition of railroad corridor property that has been abandoned pursuant to the ICC process. Md. Code (1977, 1993 Repl. Vol.), Transportation Art., § 7-901. Section 7-901 covers "any railroad property owned or maintained by a railroad company ... [that] is or was subject to the Interstate Commerce Commission's abandonment [**62] process." Section 7-901(c) requires a railroad to notify the state of its intent to dispose of a corridor. That provision states in pertinent part:

"(c) *Notice of sale or disposition — Required.* — If a railroad company intends to sell or otherwise dispose of any railroad corridor property that is located in this State *and for which the company has received permission from the Interstate Commerce Commission or other governmental agency with jurisdiction in the matter to abandon transportation services,* the company shall notify the Secretary and the Administration of its intent to sell or otherwise dispose of the property." (Emphasis in original and added).

The notification provisions of § 7-901 are intended to facilitate the state's acquisition of abandoned railroad property. *See* § 7-901(b)(authorizing acquisition of railroad corridor property). *See also* Md. Code (1974, 1997 Repl. Vol.), Natural Resources Art., § 5-1010 (declaring Maryland policy of preserving railroad corridors for trail use and authorizing the Department of Natural Resources to acquire rail corridors).

While we have never had to address whether notification under § 7-901 is required when federal regulators certify a rails-to-trails agreement (as opposed to authorizing abandonment of the line), it would appear that the section is inapplicable when a CITU is issued since a CITU is issued in lieu of approval of abandonment. This interpretation of state law is consistent with the ICC's "exclusive and plenary" jurisdiction over railroads up until the time when the ICC approves of abandonment. *See Chicago & N. W. Tr. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 321, 101 S.Ct. 1124, 1132, 67 L.Ed.2d 258, 267 (1981). *See also Preseault*, 494 U.S. at 8, 110 S.Ct. at 920, 108 L.Ed.2d at 11. The notification [**63] requirement is effective only after "the company has received permission ... to abandon transportation services." Md. Code (1977, 1993 Repl. Vol.), Transportation Art., § 7-901(c). Presumably, this is because when the ICC

approves an abandonment petition, "as a general proposition ICC jurisdiction terminates." *Preseault,* 494 U.S. at 6 n.3, 110 S.Ct. at 918 n.3, 108 L.Ed.2d at 10 n.3. *See also* 54 Fed. Reg. 8011-12 (1989). In other words, the Maryland statute comes into play only when a railroad disposes of railroad corridor property for which federal regulatory jurisdiction has ceased; since ICC regulation continues after a CITU is issued, § 7-901 would not be applicable under a rails-to-trails agreement pursuant to 16 U.S.C. § 1247(d).

B. The Railroad's Pursuit of Regulatory Abandonment

Turning to the instant case, we first note that the facts alleged to support appellants' contentions that the easement conveyed by the 1911 deed has been abandoned relate largely to actions taken by the railroad pursuant to the federal regulatory scheme. The appellants emphasize that the railroad's intent to abandon the Georgetown Branch is demonstrated by the following: the 90% decline in traffic over the years 1969 to 1985; the posting of notices in 1983 declaring that an abandonment application would be filed with the ICC within three years; the discontinuation of service in 1985 due to the need for major repairs on the trestle over Rock Creek after a storm; the B&O Executive Committee's vote to "abandon or discontinue service" over the Georgetown Branch in 1985; and the filing of the application [**64] for abandonment and discontinuance of service on April 9, 1986.

The land company concludes on the basis of these facts that

> "[t]he undisputed evidence ... shows that [the railroad] publicly stated its intention to abandon the Georgetown Branch in 1983, that an internal decision to proceed with abandonment was made in 1984, that the use of the right of way was, in fact, terminated on May 10, 1985 and that

> [the railroad's] directors formally adopted a resolution of abandonment on July 22, 1985, more than three years before ... agree[ing] to give Montgomery County a quitclaim deed."

The land company concludes that abandonment occurred in 1985 when service was discontinued because of the need for major bridge repairs. The Country Club argues that the easement "for railroad purposes" was abandoned by April 1986 when the railroad filed its ICC application and that "abandonment certainly did not occur any later than the February 1988 order of the ICC approving the abandonment." Appellants apparently concede that if the railroad had not been abandoned for purposes of state law by February 1988 (when the ICC authorized abandonment but stayed the effect of its authorization), then the right-of-way was not abandoned under Maryland law when the railroad conveyed the quitclaim deed to Montgomery County in December 1998.

The appellants' arguments oversimplify the nature of the railroads' actions. Outside of the decline in use of the line and the decision to forego repairs on the bridge over Rock Creek, which we discuss further below, the acts alleged to support a finding of abandonment of the state law property interest relate primarily to the railroad's plans to undertake an abandonment proceeding before the ICC. In regard to these facts, the issue seems to be [**65] largely one of nomenclature, *i.e.*, whether the term "abandonment" in the context of an ICC proceeding can be used synonymously with the state law concept of "abandonment" of an easement. We believe that appellants unnecessarily confuse the state law question by relying on actions taken by the railroads to comply with regulatory "abandonment" under federal law. As we explain next, the railroad's actions in pursuing regulatory "abandonment" before the ICC are consistent with

an intent to retain its state law property interests; in fact, the railroad's actions are mandated under federal law in order for the railroad to take any action to reduce or eliminate, even temporarily, its common carrier obligations. As a result, the facts alleged by appellants to evidence the railroad's intent to abandon the right-of-way prove unhelpful in determining the question of whether the right-of-way was abandoned.

1.

Appellants acknowledge that the state law question of abandonment is distinct from ICC action on abandonment. The land company argues, however, that actions taken pursuant to the federal regulatory regime establish the necessary intent to abandon under state law. For example, the notices posted in 1983 that the line would be the subject of an abandonment proceeding, the internal decisions of the committees of the railroad companies to pursue abandonment in 1984 and 1985, and the filing of the application for abandonment in 1986 are alleged to constitute evidence of abandonment.

Each of these actions, however, is a prerequisite for a railroad wishing to sell its [**66] interests in a right-of-way or to participate in a rails-to-trails agreement pursuant to 16 U.S.C. § 1247(d). Federal regulations require a railroad to post a notice on the line informing readers that the line is anticipated to be the subject of an ICC regulatory proceeding. *See* 49 C.F.R. § 1152.20(a)(3). The corporate resolutions are necessary internal decision-making steps for pursuing regulatory abandonment, and a railroad obviously cannot obtain approval for discontinuance of service or abandonment without filing an application with federal regulators.

Even if we were to conclude that the word "abandon" in the regulatory context could be synonymous with state law

abandonment of an easement, the railroad's application to the ICC made clear that the "[a]pplicants seek to abandon and discontinue *service*" over the Georgetown Branch, not their interest in the land. (Emphasis added). The application repeatedly refers to the "proposed abandonment," and it noted that "various public bodies may be interested in acquiring the subject properties for public purposes or uses." As the federal appeals court for the D.C. Circuit recently observed, "[t]he word 'abandon' has a precise meaning in this regulatory scheme." *NARPO v. STB*, 158 F.3d 135, 137 n.1 (D.C. Cir. 1998). *See also Cristofani v. Board of Education*, 98 Md. App. 90, 92 n.1, 632 A.2d 447, 448 n.1 (1993)(observing that "abandonment" is a concept in other areas of law beyond the easement context); *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1339 (9th Cir.)(noting the permissive nature of ICC abandonment approval, which "is only a determination that ... cessation of service would not hinder ICC's purposes. It is not a [**67] determination that the railroad has abandoned its lines"), *cert. denied*, 498 U.S. 967, 111 S.Ct. 430, 112 L.Ed.2d 414 (1990).

The railroad's statements and actions are entirely consistent with an intention to sell the right-of-way and to pursue a rails-to-trails agreement pursuant to 16 U.S.C. § 1247(d).[12] An intention to sell the right-of-way is

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[12] Furthermore, the application for regulatory abandonment should be read in the context of the statutory language requiring a railroad intending a sale pursuant to a rails-to-trails agreement to carry the burden of showing that abandonment is consistent with the public convenience and necessity standard. 49 U.S.C. § 10904(d)(1)("[T]he burden is on the person applying for the certificate [of abandonment or discontinuance] to prove that the present or future public convenience and necessity require or permit the abandonment or discontinuance.") Thus, in an apparent effort to meet the burden, the railroad explained that the line "could not be operated profitably by B&O even in the event that rehabilitation were performed." As noted in the main text, to read into the railroad's effort to meet its burden under federal regulatory law an intent to abandon its

inconsistent with an intent to abandon the property interest. *Vieux*, 906 F.2d at 1341. Moreover, regulatory abandonment was never even consummated since a trail use agreement was reached. Indeed, the corridor cannot have been abandoned under federal law because the trail use is only interim, and federal regulators may require the restoration of rail service. 49 C.F.R. § 1152.29(c)(2). *See* Part IV.A.2.

Of course, it is not an impossibility for a railroad to abandon its state law property interest when a trail-use agreement is pursued. But the decisive act required to carry the abandonment proponent's burden of proof cannot be supplied by acts entirely consistent with the federal regulatory scheme, which precludes such abandonment. Furthermore, if [**68] abandonment of the state-law property interest occurs when a trail use agreement is being pursued in compliance with federal law, that abandonment would occur without the federal regulatory approval which, as discussed next, could result in civil and criminal liability.

2.

Appellants' contention that the right-of-way was abandoned prior to the consummation of the agreement with Montgomery County would require us to conclude that the railroad intended to disobey rather than comply with various provisions of federal and state law. In other words, if it had the intent to abandon its state law property interests prior to ICC action, the railroad would have to also have intended to violate several provisions of federal law, subjecting itself to various criminal and civil sanctions. *See* 49 U.S.C. §§ 11901, 11906.[13] As one court explained, "because of the

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state law property interest in the right-of-way would create an irreconcilable dilemma for any railroad wishing to pursue an agreement under 16 U.S.C. § 1247(d).

[13] 49 U.S.C. § 11901 provides in pertinent part:

importance of uninterrupted rail [**69] transportation service in the nation's economy, Congress has expressed a clear intent, even to the point of criminal sanctions, that abandonments without prior ICC approval are not tolerated." *I.C.C. v. Baltimore and Annapolis Railroad Company,* 398 F. Supp. 454, 464 (D. Md. 1975), *aff'd* 537 F.2d 77 (4th Cir.), *cert. denied sub nom Alco Gravure, Inc. v. Baltimore and Annapolis Railroad Company*, 429 U.S. 859, 97 S.Ct. 159, 50 L.Ed.2d 136 (1976). *See also Kalo Brick & Tile,* 450 U.S. at 319, 101 S.Ct. at 1131, 67 L.Ed.2d at 266 (recognizing authority of the ICC "to pass on the reasonableness of a carrier's temporary suspension of its service and, if necessary, to order it resumed"); *Ethan Allen, Inc. v. Maine Cent. R. Co.*, 431 F. Supp. 740, 744-45 (D. Vt.

"(a) Except as otherwise provided in this section, a common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission ... an officer or agent of that carrier or a receiver, trustee, lessee, or agent of one of them, knowingly violating an order of the Commission under this subtitle is liable to the United States Government for a civil penalty of $5,000 for each violation. Liability under this subsection is incurred for each distinct violation. A separate violation occurs for each day the violation continues."

49 U.S.C. § 11914 provides in pertinent part:

"(a) When another criminal penalty is not provided under this chapter, a common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title, and when that carrier is a corporation, a director or officer of the corporation, or a receiver, trustee, lessee, or person acting for or employed by the corporation that, alone or with another person, willfully violates this subtitle or an order prescribed under this subtitle, shall be fined not more than $5,000. However, if the violation is for discrimination in rates charged for transportation, the person may be imprisoned for not more than 2 years in addition to being fined under this subsection. A separate violation occurs each day a violation of section 11321(a) or 11342 of this title continues."

1977)(holding that a railroad could be liable to a shipper for unauthorized abandonment).

The *per se* ban on abandonment without regulatory approval facilitates other aspects of the federal regulatory regime. Under 49 U.S.C. § 10905, a railroad may not abandon its line immediately on the date which the ICC determines that public convenience and necessity permit abandonment. Rather, abandonment is delayed by at least ten days after [**70] notice of the abandonment order is published in the *Federal Register* to allow any "financially responsible person" to "offer to pay the carrier a subsidy or offer to purchase the line." 49 U.S.C. § 10905(c)-(d).[14] If a

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[14] 49 U.S.C. § 10905 provides in pertinent part:

"(c) When the Commission finds under section 10903 of this title that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, it shall, concurrently with service of the decision upon the parties, publish the finding in the Federal Register. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Such offer shall be filed concurrently with the Commission....

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that —

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that that assistance would be equal to —

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line; the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

financially responsible person makes an offer, [**71] issuance of the ICC certificate is further delayed 30 days, allowing the railroad and the offeror to negotiate the terms of the purchase or subsidy. 49 U.S.C. § 10905(e). If they are unable to agree on terms, either the railroad or offeror may ask the Commission to establish the terms and conditions of the sale or subsidy. 49 U.S.C. § 10905(e)-(f). *See Hayfield N. R. Co. v. Chicago & N. W. Tr. Co.*, 467 U.S. 622, 629-30, 104 S.Ct. 2610, 2615-16, 81 L.Ed.2d 527, 534-35 (1984).

In the instant case, after the ICC authorized the railroad to abandon the Georgetown Branch, Laurel Sand & Gravel (LSG) filed an offer of financial assistance under 49 U.S.C. § 10905. The Commission found LSG to be "financially responsible" and directed the railroad to negotiate a subsidy or sale of the line to LSG. These negotiations took precedence over the proposed rails-to-trails conversion being discussed at that time with the [**72] County. *See Rail Abandonments — Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 608 (1986). The negotiations lasted more than six months but ultimately proved unsuccessful; LSG

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance."

subsequently withdrew its offer of financial assistance. Under the theory proposed by appellants, however, the negotiations between the railroad and LSG would have been essentially meaningless, since prior to the start of negotiations with LSG the railroad would have had already abandoned its right-of-way; under appellants' theory, had an agreement been reached, LSG would have either been a trespasser over the abandoned right-of-way or it would have had to reacquire the right-of-way from the land company.

In addition to the requirement of entertaining offers of financial assistance, the railroad was subject to the ICC's broad authority to place conditions on regulatory abandonment. *See* 49 U.S.C. § 10903 (b)(1)(A)(ii)(granting the ICC the power to approve abandonment "*with modifications ... [and] conditions* that the Commission finds are required by public convenience and necessity")(emphasis added). Under 49 U.S.C. § 10906, the Commission must make a determination of "whether the rail properties that are involved in the proposed abandonment or discontinuance are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation." Should the Commission find the rail properties suitable for public purposes, "the properties may be sold, leased, exchanged, or otherwise disposed of *only under conditions provided in the order of the Commission.*" *Id.* (emphasis added). Again, if the railroad had abandoned its property interests before the ICC acted pursuant to [**73] its abandonment application, it would have been impossible for the railroad to comply with any conditions imposed on the abandonment without being deemed a trespasser on the right-of-way. Moreover, the conclusion that the easement had been abandoned prior to the conveyance of the quitclaim deed — thereby leaving the railroad with no interest in the right-of-way — would appear

to contravene the spirit of the Maryland law authorizing acquisition of the right-of-way. *See* Part IV.A.2, *supra*.

We do not lightly presume, as appellants do, that a person, or in this case a railroad company, acted contrary to explicit legal requirements. "Where an individual proposes to engage in what is otherwise a lawful venture, the presumption is that he will conduct his activities in a proper manner." *Leatherbury v. Gaylord Fuel Corp.*, 276 Md. 367, 377, 347 A.2d 826, 832 (1975). This is particularly the case where, as here, criminal sanctions may be involved. No evidence in this case would support a finding that the railroad violated or intended to violate the law, and we could not uphold a finding that it took action that would be tantamount to a federal crime and that would expose it to civil liability without substantial evidence that it intended to do so, evidence which is not present here. *See also Md. Securities v. U.S. Securities*, 122 Md. App. 574, 588, 716 A.2d 290, 297 (1998)(stating presumption that administrative officers "act[] regularly and in a lawful manner"); *Valentine v. On Target*, 112 Md. App. 679, 692, 686 A.2d 636, 642 (1996)(purchasers of firearms presumed to have made purchase for legitimate purposes), *aff'd*, 353 Md. 544, 727 A.2d 947 (1999). The stipulated facts all indicate that the railroad was making every effort to comply [**74] with the law. Yet, a finding that the railroad had abandoned its state law property interest in the right-of-way would be tantamount to a finding that the railroad intended to violate the law, thereby exposing itself to criminal and civil sanctions. This we decline to do.

3.

If we were to accept the appellants' efforts to use the railroad's acts taken in pursuit of federal regulatory approval for "abandonment" as the decisive acts necessary to demonstrate an intent to abandon an easement under state

law, it would create an irreconcilable dilemma for railroads wishing to pursue rails-to-trails agreements or otherwise dispose of their property interests in right-of-ways. The railroad could not pursue a rails-to-trails agreement without filing an application for regulatory abandonment at the ICC, but the actions taken to pursue such an application, and the application itself, would constitute evidence of abandonment for state law purposes, thereby causing it to risk undermining the rails-to-trails agreement. This would create a Hobson's choice for the railroad that must apply for regulatory abandonment under federal law as the necessary first step to obtaining a CITU, while that application itself would constitute evidence of an intent to abandon in terms of state law (thereby undermining the CITU effort by making it more costly). Such a holding would completely frustrate state and federal policies intended to promote the preservation of rail corridors and their conversion to trail use. We conclude therefore that the actions of the railroad taken to comply with the federal regulatory regime [**75] cannot, as a matter of state law, supply the unequivocal act or acts that evidence the intent to abandon an easement interest in land.

C. The Insufficiency of Any Other Potential Evidence of Abandonment

We must next determine whether the remaining actions of the railroad alleged to constitute abandonment supply sufficient evidence to support a finding of an intent to abandon the easement. Those acts include the railroad's decisions to forego bridge repairs in 1984 and the subsequent discontinuance of use of the line after a storm caused major damage to the bridge in 1985. Even assuming that the forbearance of repairs combined with the nonuse of the right-of-way constitute more than evidence of mere nonuse, we conclude that they are insufficient to meet appellants'

initial burden of proving a clear and unequivocal act that is necessary to support a finding of an intent to abandon.

Our conclusion is dictated by our previous cases concerning abandonment of an easement by a railroad. In *Canton*, *supra*, for example, we affirmed a finding that a railroad right-of-way had not been abandoned when the circumstances much more strongly supported a finding of abandonment than the instant case. The appellant, the Canton Company, was the owner of land over which a right-of-way had been taken in a condemnation proceeding brought by the B&O in 1885 and for which it was paid $20,000. The railroad took possession of the land and laid track, but it never connected the track with its other tracks, and in 1898 it removed the tracks although they never "ha[d] been employed [**76] for any substantial use." *Canton,* 99 Md. at 214, 57 A. at 637. In addition, the railroad used other connections instead of going through the condemned land. One of the alternative routes was achieved through a contract, entered into in 1890 and to last 999 years, which required it to ship over that line "all its traffic of every kind passing through the city of Baltimore." *Canton,* 99 Md. at 220, 57 A. at 640. Primarily on the basis of these facts, *Canton* brought an action in ejectment claiming that the railroad had abandoned the strip of land condemned. We affirmed the circuit court's ruling that the easement had not been abandoned, observing that nonuse of an easement will not *per se* operate as abandonment "unless there is some decided and unequivocal act of the owner inconsistent with the continued existence of the easement, or unless the nonuse has been for a considerable period...." *Canton*, 99 Md. at 218, 57 A. at 639. We rejected the contention that the contract for use of an alternative line, requiring "all ... traffic of every kind" to go over that line, was sufficient evidence of abandonment. *Canton*, 99 Md. at 220-21, 57 A. at 640.

Unlike *Canton,* in the instant case, the evidence is undisputed that the railroad actually used the right-of-way for some 90 years until 1985, when the need for major bridge repairs made continued use unfeasible. It is also undisputed that about the time the railroad began taking steps toward obtaining permission from the ICC for regulatory abandonment, a management committee of the railroad had agreed to pursue negotiations with Montgomery County for transfer of the right-of-way. In *Canton*, the railroad made an affirmative decision to remove tracks on land condemned for a right-of-way — tracks which [**77] had never really been used — and to enter a contract whereby "all" of its traffic would go over another line for 999 years; nevertheless, we held that the facts failed to supply the decisive act necessary to show an intent to abandon. In the instant case, there is much less evidence of an unequivocal and decisive act evidencing an intent to abandon the property interest in the right-of-way. The use of the right-of-way ended altogether only because of the deterioration of a bridge (due to a severe weather storm) while at approximately the same time the railroad undertook action to adhere to federal regulations to end service over the line and to negotiate the sale of its assignable interest in the right-of-way pursuant to the Rails-to-Trails Act. The decision to take up tracks and enter a long-term contract for another route in *Canton* provided stronger evidence of an intent to abandon than the decision to forego repairs in the instant case — particularly when that decision is consistent with the contemplated new transit use of the corridor. If anything, the railroad's actions in this case evidence a clear intent not to abandon but to sell to the County its interest in the right-of-way consistent with the requirements of federal regulation. As one court observed in a similar context, "[c]onveyance of property and abandonment of property are not consistent actions." *Vieux,* 906 F.2d at 1341.

Furthermore, a railroad's participation in a rails-to-trails program implies that it does not intend to fully abandon the line, but rather to retain the right-of-way while permitting interim trail use. *Birt*, 90 F.3d at 587; *KCT Railway Corporation — Abandonment Exemption — In Franklin, Anderson, and Allen Counties, KS*, 7 I.C.C.2d 1035, 1036 [**78] (1991) (observing that railroad's interest in negotiating trail agreement is "inconsistent with clear intent to consummate the abandonment and implies that KCT may be interested in preserving the right-of-way for the future restoration of rail service"). The facts of this case closely resemble those in *Birt*. In that case, the landowner, Birt, argued that the railroad had abandoned its property interest in the right-of-way prior to the consummation of a rails-to-trails agreement, thus depriving the ICC of jurisdiction over the rail corridor. In reviewing a decision of the ICC that abandonment had not occurred, the court explained:

> "The Commission has listed several concrete actions which may indicate an intent to abandon: cessation of operations cancellation of tariffs, salvage of the track and track materials, and relinquishment of control over the right-of-way. *These factors, however, are equally consistent with temporary cessation of operations ('discontinuance'), which permits a rails-to-trails conversion but does not effect a permanent abandonment.* Thus, to determine whether the railroad's conduct is abandonment or mere discontinuance, we must often look to additional behavior which signifies one or the other...." (Citations omitted).

Birt, 90 F.3d at 585-86. The court also rejected Birt's contention that abandonment occurred as a result of two letters written by the railroad which explicitly conceded that the right-of-way "was abandoned." *Birt*, 90 F.3d at 586. Fewer facts in the instant case are available for reaching a

conclusion that the right-of-way was abandoned than in *Birt*. Appellants have produced no letter from the railroad declaring that the right-of-way has been abandoned.[15]

That the right-of-way could not have been abandoned is further evidenced by the [**79] federal requirement that when a right-of-way is converted to trail use under 16 U.S.C. §1247(d), regulatory abandonment is foregone and the ICC's approval is expressly made "subject to the future restoration of rail service." 49 C.F.R. § 1152.29(c)(2)(requiring the CITU to state that "interim trail use is subject to future restoration of rail service"); *id.* at (c)(3)(stating that if a railroad seeks to reinstitute service over the right-of-way, and federal regulators grant permission to do so, "the CITU will be vacated accordingly." As the ICC has stated,

> "By consenting to the issuance of a CITU/NITU, a carrier agrees to forgo consummating the authorized or exempted abandonment. As a consequence, *its common carrier obligation does not terminate.* Instead, *the abandoning carrier retains a residual common carrier obligation and transfers the right-of-way to the trail user, subject to the stipulation that the rail corridor remain available for the reinstitution of rail service.* A carrier's decision to agree to a CITU/NITU is totally voluntary and, as far as the Commission is concerned, may be withdrawn at any time the abandoning carrier wishes to reinstitute rail operations over the right-of-way." (Emphasis added.)

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[15] During the course of litigation, however, appellees produced a letter written by the railroad in 1988 expressly stating that the right-of-way had *not* been abandoned.

Norfolk & Western Railway Company — Abandonment between St. Marys and Minster in Auglaize County, OH, 9 I.C.C.2d 1015, 1018 (1993).

Thus, upon the consummation of a rails-to-trails agreement, the right-of-way is placed in a national "railbank," and, at a later date, federal regulators may permit removal of the corridor from the railbank in order to reactivate service. That service may be reactivated on the right-of-way supports our conclusion that the right-of-way has not been abandoned, for [**80] it would be difficult, if not virtually impossible, to reactivate service on an abandoned line.[16]

Our decision avoids frustrating the federal and state public policies of promoting the conversion of railroad rights-of-way for other transportation and recreational uses. Were we to hold otherwise, it would be hard to imagine a situation in which a railroad pursuing a rails-to-trails agreement would not have abandoned its property interest, since there must be some point at which a railroad comports itself differently in anticipation of a rails-to-trails agreement than if it were to continue to operate the line. Conversely, if we were to hold that the failure to repair the bridge over Rock Creek were sufficient to carry appellants' burden of proving an intent to abandon, we would create an incentive for a railroad to make futile expenditures in order to avoid being found to have abandoned its property interest under state law as it complies with the mandates of federal law.

We do not intend to intimate that a railroad may never abandon an easement under Maryland law prior to federal

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[16] Since the right-of-way was expressly made transferable to "successors and assigns," whether service would be reactivated by the railroad, the County, or a future successor in interest has no bearing on our conclusion.

regulatory approval of abandonment; rather, we merely hold that under the circumstances of this case, where the actions supporting the alleged abandonment coincide in time and in function with the railroad's efforts to comply with federal law and where there is no suggestion or reason to conclude that the railroad intended to not comply with federal law, as a matter of Maryland law, the facts are not sufficient to meet the burden of showing that abandonment occurred prior to the railroad's conveyance [**81] of the quitclaim deed to the County. While the question of abandonment of an easement is to be decided as a matter of Maryland property law, the question should not be resolved in a vacuum in which the federal regulatory scheme is ignored.[17]

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[17] Indeed, the CFC implicitly recognized the illogic of ignoring the comprehensive regulation scheme in determining the state law question of abandonment of an easement. In finding that the easement had been abandoned when the ICC issued its order of February 25, 1988, the court discussed at length an early decision of this court, *Benson v. Public Service Comm.*, 141 Md. 398, 118 A. 852 (1922), relating to state regulatory approval of abandonment of rail service. *Benson* involved a suit by citizens against the Maryland Public Service Commission (PSC) contesting the agency's authorization of abandonment of the railroad line. In that case, we upheld the PSC's abandonment order based on its uneconomical operation, declaring that "the only safe criterion [for evaluating whether to abandon service] ... is ... the measure of which is the ability of the [railroad] from its earnings to meet its operating expenses and fixed charges." *Benson*, 141 Md. at 404, 118 A. at 854. The CFC concluded that the PSC standard is not as rigorous as the ICC's "public convenience" standard and, since the February 1988 ICC order concluded that abandonment was appropriate and conditioned abandonment only for inquiry into a Rails-to-Trails agreement, that the order "provided ... the rough equivalent of the PSC abandonment authorization." *Chevy Chase Land Co. of Montgomery*, 37 Fed. Cl. at 580.

We agree with the CFC that the regulatory scheme under which the railroad operated is relevant to whether it intended to abandon the right-of-way, but we disagree with its reading of *Benson*. *Benson* did not involve a question of whether an easement had been abandoned, but

[**82] Finally, we note that our conclusion that the evidence is insufficient to show that the railroad intended to abandon the right-of-way is consistent with the obvious economic interests of the railroad. The railroad had a "free and perpetual" interest in the portions of the right-of-way at issue in this case; it would have been irrational for the railroad to abandon the right-of-way without attempting to recover some value from its interest in the land. As the stipulated facts demonstrate, the railroad did in fact pursue a course of action whereby it recovered value through the sale of the corridor to the County. As explained above, that course of action was necessarily lengthy and somewhat arduous because of the scheme of federal regulation under which it was operating. The railroad had to pursue that process, however, in order to derive any economic value out of its right-of-way.

In sum, we hold that when a railroad takes actions pursuant to federal regulation that are wholly consistent with an intent to retain the property interest, in this case in order

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rather whether the state agency had properly approved abandonment of *service*. *See* Part IV.B.1, *supra* (distinguishing between regulatory abandonment and the state law property concept of abandonment). We upheld an order of the PSC permitting a railroad to abandon service on a portion of its line based on a statute giving it the power "to approve or disapprove of the abandonment or discontinuance ... by any common carrier, railroad corporation, or street railroad corporation of the exercise of the franchise or right conferred upon it by its charter." *Benson*, 141 Md. 401, 118 A. at 853. The issue in the case concerned the validity of the PSC's order regarding the ceasing of service; we did not discuss nor did the case involve any property law issues such as easement abandonment. Therefore even if we were to agree with the CFC that the February 1988 order of the ICC was the "rough equivalent of the PSC abandonment authorization," our agreement would have no bearing on the issue here related to abandonment of the railroad's property law interest in the right-of-way.

to pursue an interim trail use agreement, those actions alone cannot supply the decisive and unequivocal act evidencing an intent to abandon. It follows that in the instant case, where the appellants have not pointed to any other actions sufficient to carry their burden of proving an act sufficiently evidencing an intent to abandon, the right-of-way was not abandoned prior to the railroad's conveyance of the right-of-way to Montgomery County.

V. CONCLUSION

The first certified question asks whether the 1911 deed to the railroad from the land [**83] company conveyed a fee simple absolute or an easement. We have held that it conveyed an easement. The plain text of the instrument states that a right-of-way was conveyed and there is no indication that anything more than a right of passage was intended, particularly in light of the deed's separate conveyance in fee simple of the land on which a passenger station was to be located. This conclusion is confirmed by the circumstances of the conveyance, including the existing railway and the nominal consideration given by the railroad in light of its contractual obligations.

Second, we addressed whether the use of the right-of-way as a hiker/biker trail is within the scope of the easement. Based on the absence of limitations on use of the right-of-way in the language of the deed, we concluded that the use is within the legally anticipated scope of the 1911 deed, in light of the railroad's status as a highly regulated public service corporation. The deed anticipated a means of transit over the right-of-way, and the trail use is consistent with what was anticipated. Moreover, the use of the right-of-way as a trail poses no unreasonable burden on the servient estate; indeed, the use is less burdensome than freight railroad use.

The third certified question asked us to examine whether the railroad had abandoned its state law property interest in the easement. The resolution of the abandonment question required that we assess the federal regulatory framework covering railroad "abandonment," which is distinct from the property law concept of abandonment of an easement. We concluded that appellants failed to meet their burden of alleging a sufficiently decisive and [**84] unequivocal act evidencing an intent to abandon, particularly given that most of the railroad's actions were taken in order to comply with federal law.

CERTIFIED QUESTIONS ANSWERED AS HEREIN SET FORTH. COSTS IN THIS COURT TO BE EVENLY DIVIDED.

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IN THE COURT OF APPEALS OF MARYLAND

Misc. No. 24

September Term, 1998

CHEVY CHASE LAND COMPANY et al.

v.

UNITED STATES et al.

Bell, C. J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell

JJ.

Dissenting opinion by Cathell, J.

Filed: July 29, 1999

[**1] Cathell, J., dissenting:

I respectfully dissent from the portion of the majority's opinion holding that the railroad line at issue was not abandoned under Maryland property law.

The Court reaches its conclusion on the abandonment issue by answering a question not certified to us by the federal court — the effect of *federal* law on the purported abandonment. In doing so, the majority seeks to answer the ultimate question before the United States Court of Appeals for the Federal Circuit. Our task was to answer the third certified question based on *Maryland* law: "If the deed conveyed an easement . . . , has that easement, as a matter of law, been abandoned at any time since its conveyance, and if so, when?"

Recognizing this distinction, it is important to note the context of the federal case from which the certified question was presented. Plaintiffs, possible owners of real property interests, initiated an action in federal court claiming that those property interests had been the subject of an unconstitutional "regulatory taking" by operation of the federal statutes involved and were entitled to just compensation. They asserted that but for the effect of the federal statutes, they would be the owners of the interest in the property under the state law of abandonment. The federal statutes at issue are those described by the majority as forbidding, for the first time in Maryland, abandonment in the absence of compliance. The issue being litigated in federal court is whether the effect of the same statutes deprive the owners of all economically feasible uses of their property. The majority holds that the plaintiffs do not own an interest in the property because of the effect of the same federal [**2] statutes on the Maryland common law pertaining to abandonment.

The Federal Circuit has asked this Court to interpret the Maryland law on abandonment in the absence of the effect of the federal statutes. The majority tells that court what it already knows, not what it needs to know to resolve whether the statutes' impact is so severe as to cause a regulatory taking. Federal courts are able to assess the impact upon the property at issue resulting from the application of the federal statutes. The majority, in some type of reverse "boot strapping" beyond my logical comprehension, answers the certified question by incorporating the effect of the federal statutes into Maryland property law. Under the majority's reasoning, if a federal regulatory statute abolishes a Maryland property right, the property right never existed. Under that theory, an unconstitutional taking of property never could occur.

The question should be answered, and I believe the federal court wanted it answered, as if the federal statutes did not exist. The majority alters an established doctrine of Maryland property law that has existed for one hundred years or more in an attempt to assist the federal government to avoid its constitutional obligation to compensate property owners if a federal statute so impacts the property as to leave the property owner with no viable economical use.

The majority also holds that the conveyances to the railroad in 1911 were conveyances of easements. The United States Court of Federal Claims found to the contrary, but opined that if the early conveyances had granted easements, those easements [**3] had been abandoned under Maryland law. *Chevy Chase Land Co. v. United States*, 37 Fed. Cl. 545, 580 (1997). The majority's position in this case directly conflicts with that earlier ruling in the same case. The Court of Federal Claims was correct on the Maryland law of abandonment.

In the case *sub judice,* all parties agree that railway use of the land ceased and has remained inoperative for an appreciable period of time. As the briefs reflect, uncontested and substantial evidence exists that the railroad did not intend to operate rail service, did not operate rail service for an extensive period of time, and intended to abandon that service. The facts are clear, at least to me, that on May 10, 1985, rail service ceased completely due to the deterioration of a bridge over Rock Creek Park and the prohibitive costs of repairing it. Thereafter, on July 22, 1985, the railroad passed a resolution abandoning railway service. That resolution was at least an expression of intent to abandon the right-of-way, notwithstanding the federal statutes at issue in the federal case. The Baltimore and Ohio Railroad Company, which had been operating the rail service prior to May 10, 1985, consented to that abandonment or intent to abandon, as the case may be. The railroad then filed appropriate abandonment petitions with the ICC. That agency made a determination that abandonment was Appropriate, but held up formal approval for the apparent purpose of permitting Montgomery County (County) and the railroad to take advantage of the federal statutes involved in the federal "takings" claims. The County entered into agreements under the statutes and acquired the right-of-way. The railroad cautiously executed only quit claim [**4] deeds to the County.

The true issue to be determined by this Court was what property, if any, did the railroad own? If it owned nothing, it conveyed nothing. If it had abandoned its right-of-way prior to that time, the right-of-way would have reverted to the adjacent fee simple owners under Maryland law as the law existed prior to the majority's opinion in this case.

Turning to the Maryland law of abandonment, this Court said in a case involving a dispute over a right-of-way created

as early as 1790, that rights-of-way can be abandoned by nonuse combined with an *intention* to abandon:

> [I]t must follow, upon every principle, that the non-user of the right may be extinguished, by presuming a release of it for the purpose of quieting the possession. And the presumption of a release in this case is strongly fortified by the circumstance, that the parties, to whom the right of way in question was originally granted, and those claiming under them, had used another and distinct route over the land of the defendant.

Wright v. Freeman, 5 H. & J. 467, 477 (1823). In *Vogler v. Geiss*, 51 Md. 407, 410 (1879), we stated in clearer language:

> It is now very well settled, by authorities of the highest character, that a party entitled to a right of way or other mere easement in the land of another may abandon and extinguish such right by acts *in pais*, and without deed or other writing. The act or acts relied on, however, to effect such result, must be of a decisive character; and while a mere declaration of an intention to abandon will not alone be sufficient, the question, whether the act of the party entitled to the easement amounts to an abandonment or not, depends upon the intention with which it was done, and that is a subject for the consideration of the jury. *A cesser of the use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time.* [Second emphasis added.]

[**5] The law in Maryland with respect to the abandonment of easements has remained the same, with but

one possible aberration.[1] Moreover, the law has always focused on *intent*. Applying the long-standing legal principle to the facts of this case, excluding the effect of the federal statutes, the railroad clearly abandoned its right-of-way: there was a cessation of use since at least 1985, resolutions to abandon by both railroad companies (consent to abandon by one), a petition to the appropriate agency for an approval of the abandonment, and a determination by that agency that abandonment was appropriate. In my view, this is a classic example of abandonment. If the right-of-way at issue were not subject to the federal statutes, and the landowners abutting the easement were able to present in federal court the evidence presented here, it is clear, probably even under the majority's position, that the traditional elements of abandonment have been met. Except for the actions of the federal entities in attempting to have the federal statutes impact upon that abandonment, the decision of this Court should be simple. Instead, in an attempt to further the environmental concerns of the County and federal governments, the majority changes the law of Maryland, [**6] but says that change has always been the law. It has not always been the law and it cannot be logically so asserted.

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[1] The Court of Special Appeals in *Anne Arundel County v. Baltimore & Annapolis Railroad*, 46 Md. App. 350, 416 A.2d 777 (1980), though faced with a jurisdictional question in a case in which the remaining issue before it was the applicability of an express reverter, opined at length on the nature of the abandonment requirements under federal railway abandonment statutes. The opinion assumed that federal regulatory abandonment requirements were the same as the Maryland law of abandonment. Whether they were the same was not at issue; nor was there any question as to regulatory unconstitutional takings issues. The issues before this Court in this case go to fundamental principles of Maryland property law and whether takings issues can be avoided by using the impact of the federal statutes to divest Maryland property owners of property rights they otherwise would possess.

The law has not changed since *Vogler*. We have maintained a consistent position until the majority's opinion in this case. In *Canton Co. v. Baltimore & Ohio Railroad*, 99 Md. 202, 217-19, 57 A. 637, 638-39 (1904), we found that no abandonment had occurred because there was only evidence of nonuse and no evidence of intent to abandon. Nonetheless, we restated the law of abandonment from *Vogler* that sufficient evidence of nonuse plus intent to abandon demonstrates an abandonment. *Id.* at 218, 57 A.2d at 639. We likewise reiterated the law in *Cityco Realty Co. v. Philadelphia, Baltimore & Washington Railroad*, 158 Md. 221, 226, 148 A. 441, 443-44 (1930):

> It is well settled . . . that a party entitled to a right of way or other mere easement in the land of another may abandon and extinguish such right by acts *in pais*. The act or acts relied on, however, to effect such result, must be of a decisive character, and whether the act amounts to an abandonment or not depends upon the intention with which it was done. A cesser of the use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time. *Vogler v. Geiss*, 51 Md. 407; *Stewart v. May*, 119 Md. 10[, 85 A. 957 (1912)]. * * * It seems to be generally agreed that in this matter no one case can be authority for another. Time is not a necessary element; it is not the duration of the non-user, but the nature of the acts done or permitted, and the intention which the one or the other indicates, that are important.

See also Millson v. Laughlin, 217 Md. 576, 588, 142 A.2d 810, 816 (1958) ("Whenever abandonment or non-user, coupled with other circumstances, show an *intention* to make no further use of the easement, then it will have been extinguished. But *intention* to abandon [**7] is essential."

(emphasis added)); *Brehm v. Richards*, 152 Md. 126, 131-32, 136 A. 618, 620 (1927) ("[C]esser of use, coupled with an act clearly indicative of an *intention* to abandon the easement, would have the same effect as an express release of it." (emphasis added) (citing *Stewart*, 119 Md. 10, 85 A. 957; *Vogler*, 51 Md. at 410)); *Knotts v. Summit Park Co.*, 146 Md. 234, 241, 126 A. 280, 282 (1924) ("A cesser of the use, coupled with any act clearly indicative of an *intention* to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time." (emphasis added)); *Public Service Comm'n v. Philadelphia, Baltimore & Washington R.R.*, 122 Md. 438, 443, 89 A. 726, 728 (1914) (same) (citing *Vogler*, 51 Md. 407; *Glenn v. Davis*, 35 Md. 208 (1872)).

One of the cases cited by the majority, *Maryland & Pennsylvania Railroad v. Mercantile-Safe Deposit & Trust Co.*, 224 Md. 34, 166 A.2d 247 (1960), is factually similar to the present case if the impact of the federal statutes is not considered. In that case, the "Ma & Pa" Railroad had used the subject property as a railroad until 1958. That year it ceased operations and removed the rails and ties. The trial court found that the railroad's title was to an easement only and that the easement had been abandoned. On appeal, this Court held that removal of the rails and ties from the easement constituted an abandonment of it," and noted:

> The general rule is that the right and title to a *mere* easement in land acquired by a *quasi*-public corporation, either by purchase, condemnation or prescription, for a public purpose is dependent upon the continued use of the property for that purpose, and when such public use is abandoned the right to [**8] hold the land ceases, and the property reverts to its original owner or his successors in title.

Id. at 39, 166 A.2d at 250. After distinguishing *Canton Co.*, 99 Md. 202, 57 A. 637, on the basis that the railroad officials in that case had testified they had no intention to abandon the right-of-way, while in *Maryland & Pennsylvania Railroad* there had been no disclaimer of an intent to abandon, we further discussed the Maryland law of abandonment:

> [T]he law is well settled that the *intent* to abandon may be shown by the acts of a party indicating such an *intention*. Therefore, since the uncontroverted evidence in the present case was to the effect that the defendant had ceased to operate as a railroad in 1958 and had removed its rails and ties from the right of way, and since time is not an element in abandonment if it is shown that use of the easement has ceased and there has been some act clearly indicative of an *intention* to abandon the right of further use, it was proper for the trial court to conclude, as it did, that there had been abandonment.

Maryland & Pennsylvania R.R., 224 Md. at 40, 166 A.2d at 250 (citations omitted) (emphasis added).

In *East Washington Railway Co. v. Brooke*, 244 Md. 287, 223 A.2d 599 (1966), a railway company had obtained possession of a right-of-way through a prescriptive easement.[2] Addressing whether the right-of-way had been abandoned, we said:

> The removal of the ties and rails, plus the statement of Mr. Rector, the president and general manager of

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[2] The railway's deed to the property had been preceded by a conveyance to another party. The trial court thus ruled that the railway's deed was invalid, but then found that because it had operated the rail line for the period necessary to obtain a prescriptive easement, it had a valid right-of-way. *East Washington Ry.*, 244 Md. at 289, 223 A.2d at 600-01. The issue, therefore, was whether it had abandoned the right-of-way it had obtained by prescription.

> defendant, that the company has no [**9] *intentions* of ever operating a railroad over the contested strip, indicates that the use of the property for railroad purposes has been abandoned. In *Ma. & Pa., supra*, it was stated at page 39 of 224 Md., [166 A.2d at 250]:
>
> > "The general rule is that the right and title to a *mere* easement in land acquired by a *quasi*-public corporation, either by purchase, condemnation or prescription, for a public purpose is dependent upon the continued use of the property for that purpose, and when such public use is abandoned the right to hold the land ceases, and the property reverts to its original owner or his successors in title."
>
> See also *Hagerstown & F. Rwy. Co. v. Grove*, 141 Md. 143, 118 Atl. 167. Compare *Canton Co. v. Balto. & Ohio R. Co.*, 99 Md. 202, 57 Atl. 637. Because it has abandoned the right-of-way, the Railroad and its successor have no existing claim to the contested strip of land.

Id. at 293, 223 A.2d at 603 (emphasis added); *see also D.C. Transit Systems, Inc. v. State Roads Commission*, 259 Md. 675, 690-93, 270 A.2d 793, 801-02 (1970) (*D.C. Transit I*) (restating the law of abandonment by quoting *Maryland & Pennsylvania R.R.* at length).

In *D.C. Transit System, Inc. v. State Roads Commission*, 265 Md. 622, 290 A.2d 807 (1972) (*D.C. Transit II*), we upheld the trial court's finding of abandonment, notwithstanding the railroad officials' attempts to disclaim an intent to abandon:

> The only question presented here, of course, is whether DCT has abandoned the easements. Relying on *Canton Co. v. Baltimore & Ohio R. Co.*, 99 Md. 202[, 57 A. 637] (1904), it argues that nonuser is insufficient to

establish abandonment unless an intention to abandon can be shown. While we agree this is a correct statement of the law, we think *Canton* is factually distinguishable from the case at bar.

It is generally conceded that the abandonment of a right of way is to a large extent a matter of intent; rarely, however, is intent proved directly. *See, e.g., Maryland & Pa. R. Co. v. Mercantile-Safe Deposit & Trust Co.*, 224 Md. 34, 40[, 166 A.2d 247] (1960); 44 Am. Jur. *Railroads* § 108 (1942). Of [**10] course, statements of company officials indicating an intention to abandon or no longer to use a right of way have been afforded considerable weight in finding an abandonment. *People v. Ocean Shore R., Inc.*, 32 Cal. 2d 406, 196 P.2d 570 (1948); *Westcott v. New York & N.E. R. Co.*, 152 Mass. 465, 25 N.E. 840 (1890). Ordinarily, however, statements *disclaiming* an intent to abandon, while of some value, are too weak and too insufficient to bar a contrary finding where there is other evidence. *Ocean Shore R. Co. v. Doelger*, 179 Cal. App. 2d 222, 3 Cal. Rptr. 706 (1960); *see Canton, supra*. The rule has evolved, therefore, that to produce the abandonment of an easement there must be action in respect of its use which indicates an *intention* never to make use of it again. 2 American Law of Property § 8.97 (A. J. Casner ed. 1952). This rule, in varying forms, has been applied in most jurisdictions. *See, e.g., Maryland & Pa. R. Co., supra*; *Hagerstown & Frederick R. Co. v. Grove,* 141 Md. 143[, 118 A. 167] (1922); *Smith v. Harris*, 181 Kan. 237, 311 P.2d 325 (1957); *Sindler v. Wm. M. Bailey Co.*, 348 Mass. 589, 204 N.E.2d 717 (1965); *United Parking Stations, Inc. v. Calvary Temple*, 257 Minn. 273, 101 N.W.2d 208 (1960); *Freedman v. Lieberman*, 2 N.J. Super. 537, 64 A.2d 904 (1949); *Spaeder v. Tabak*, 170

> Pa. Super. 392, 85 A.2d 654 (1952); *Spangler v. Schaus*, [106 R.I. 795,] 264 A.2d 161 ([] 1970).

Id. at 625-26, 290 A.2d at 810 (emphasis added).

D.C. Transit System contended in that case that it never intended to abandon the right-of-way (a trolley line), but that its intent was "that of planning to use the land for a monorail system and alternatively for a high speed bus line." *Id.* at 624, 290 A.2d at 809. By contrast, the uncontested evidence in the case *sub judice* was that railroad officials intended to abandon the right-of-way, passed resolutions as such, and filed petitions for abandonment. In *D.C. Transit II*, the trial judge had specifically found that "[v]arious officers of the Transit Company testified that a monorail system has been under study since at least 1957." *Id.* Conversely, the uncontested evidence in the case *sub judice* showed that the railroad officials clearly contemplated the abandonment of service and that, only after [**11] arrangements were made for a quit claim deed to be delivered to the County by the railroad company, despite the ICC's preliminary finding that abandonment was appropriate, did the County acquire whatever the railroad had possessed. In *D.C. Transit II*, many documents supported the railroad's position that when it discontinued rail service and removed the rails, it did not intend to abandon the right-of-way, but to use it for future transit service by monorail or high-speed buses. The evidence supporting disclaimer of abandonment in *D.C. Transit II* is one hundred percent stronger than the evidence in the case at bar, in which *no* evidence exists of anything other than an intent to abandon.

In the present case, the railroad made a decision not to repair the bridge over Rock Creek Park. It then ceased use of the right-of-way in 1985. In that same year, it passed explicit resolutions stating its official intention to abandon. The railroad then filed a petition with the ICC informing that

agency of its intention to abandon. *Cf. Thompson v. Maryland & Pennsylvania R.R. Preservation Soc'y*, 417 Pa. Super. 216, 224, 612 A.2d 450, 454 (1992) (noting that an ICC certificate of abandonment is evidence of intent to abandon a property interest), *appeal denied*, 533 Pa. 635, 621 A.2d 581 (1993). The ICC found that abandonment was appropriate. There was simply nothing more the railroad could do to prove abandonment. It used every means short of the Goodyear Blimp to announce its intent to abandon. The majority holds that because the ICC failed to approve the abandonment officially (while, coincidentally or intentionally, it was encouraging the railroad to quit claim its rights to the County, disregarding those who, under the Maryland law of abandonment, [**12] may have owned the property rights), there has been no abandonment. The majority fails to recognize that under Maryland law and the cases discussed, *supra*, abandonment is complete when two things exist: 1) cessation of use and 2) *intention* to abandon. Both of these elements exist in the case at bar. That is all the Federal Circuit wanted us to consider.

The majority does at least recognize that "abandonment" under the federal railroad commerce statutes has a different meaning than under general state property law. *See* majority op. at Part IV.B.1. Under federal law, the term applies to abandonment of *service*, while under state law it refers to abandonment of the relevant *property interest*. *See, e.g., Burlington N. R.R. v. Kmezich*, 48 F.3d 1047, 1050 (8th Cir. 1995) ("Actual cessation of service extinguishes interests under the [state] statute. I.C.C. abandonment is not the triggering event."); *Penn Cent. Corp. v. U.S. R.R. Vest Corp.*, 955 F.2d 1158, 1159 (7th Cir. 1992) (noting there are "two senses of abandonment"; one of service and one of title to property); *cf. Thompson*, 417 Pa. Super. at 227, 612 A.2d at 455 ("A [state] certificate granting permission to abandon

railway crossings is not dispositive of whether or not a railroad has abandoned a right of way, as the certificate, without more, does not constitute abandonment."). What the majority fails to recognize, however, is that abandonment of the property interest can occur *before* abandonment of service is approved by the federal government. *See Preseault v. United States*, 100 F.3d 1525, 1546-49 (Fed. Cir. 1996) (affirming trial court's decision that a railroad abandoned its easement ten years before seeking ICC approval of service abandonment); *Burlington N. R.R.*, 48 F.3d at 1050 [**13] (holding that, under Iowa state law, railroad abandoned its right-of-way interest when it ended service "prior to 1985," not when the ICC approved the abandonment of service in 1985); *Kansas City Area Transp. Auth. v. 4550 Main Assocs.*, 742 S.W.2d 182, 190 (Mo. Ct. App. 1986) (noting that the holders of a right-of-way abandoned their interest by selling it six days prior to ICC approval of rail service abandonment), *cert. denied*, 484 U.S. 1063, 108 S. Ct. 1020, 98 L. Ed. 2d 985 (1988). Thus, despite the majority's contention, the railroad in this case could and did abandon its right-of-way property interest even though the ICC had not formally approved abandonment of service. It follows that the scope of the original right-of-way is irrelevant because the evidence reflects that the railroad intended to abandon its property interest entirely, long before its purported conveyance to the County.

The majority also fails to see that, despite the federal approval of service abandonment, it is only the abandonment of the property interest that determines whether the purported reversionary property interests in this case vested and were subsequently "taken" under the federal rails-to-trails law. Justice Sandra Day O'Connor recognized as much in her concurrence in *Preseault v. ICC*, 494 U.S. 1, 21, 110 S. Ct. 914, 926, 108 L. Ed. 2d 1 (1990) (O'Connor, J., concurring),

when she stated: "Determining what interest [the holders of the right-of-way] would have enjoyed under Vermont law, *in the absence of the ICC's recent actions*, will establish whether [the holders of the right-of-way] possess the predicate property interest that must underlie any takings claim." (Emphasis added.) Justice O'Connor, joined by Justices Scalia and Kennedy, further explained that

> [**14] the [ICC]'s actions . . . do not displace state law as the traditional source of the real property interests. The Commission's actions may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights. Any other conclusion would convert the ICC's power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment.

Id. at 22-23, 110 S. Ct. at 927, 108 L. Ed. 2d 1 (O'Connor, J., concurring) (citations omitted); *see also National Wildlife Fed'n v. ICC*, 850 F.2d 694, 706 (D.C. Cir. 1988) ("In any individual case, the effect of trail use on the reversionary owner's property rights will depend, in part, on precisely what those rights are *under relevant state law*." (Emphasis added.)). The position of Justices O'Connor, Scalia, and Kennedy in *Preseault* is, in my view, the appropriate position. The majority's position in this case does *exactly* what Justice O'Connor said would occur; it converts the "ICC's power to preempt conflicting state regulation of interstate commerce into the power to preempt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment."

Instead of recognizing the role of state property law, the majority creates a new, third element in the law of

abandonment for Maryland. That is, in addition to cessation of use and intent to abandon a property interest, the easement holder also must receive approval of federal authorities of a service cessation, if statutes require such approval, prior to the vesting of reversionary property interests that traditionally would have occurred. In doing so, the majority refuses even to pay lip service to the Fifth Amendment's property rights provisions. The majority does for the federal government what the Supreme Court has said [**15] the federal government cannot do. I reiterate that the federal court was well aware of the federal regulations necessitating approval; the federal regulations and their "takings" effect are the crux of the issue the federal court is deciding. It did not need that information from this Court. It merely wanted to know what, in the absence of the federal regulations, was the law of abandonment in Maryland governing the purported reversionary interest.

The majority goes to some length to argue that the uses the County intends for the property are within the scope of the original right-of-way of the railroad company. I disagree. But, more importantly, that scope is not relevant to whether the railroad company abandoned its right-of-way. If it abandoned its right-of-way, it abandoned all of it and it abandoned it prior to transferring the quit claim deed to the County. As to the question certified to this Court, whether the right-of-way has been abandoned, the intentions of the County as to future uses have absolutely no relevance. If the withholding of abandonment approval pursuant to the federal statutes is the reason the majority proffers, as it appears to, as to why the right-of-way has not been abandoned, that approval is still being withheld.

The County's intentions have nothing to do with this case. Its quit claim deed was extracted from the railroad after the point that abandonment had taken place under what,

prior to this case, used to be the law. If the right-of-way was abandoned before the County bought its quit claim interest, it bought a lawsuit. If not, then the certified question is answered and additional questions as to what the County bought have nothing to do with the certified question and should be left to another case, if necessary.

[**16] This is the second time in this term that the Court has rendered decisions that constitute, in my view, drastic departures from the theretofore accepted legal doctrines and theories relating, directly or indirectly, to the law of real property. In the present case, the Court adds a new element, final regulatory approval, to the centuries-old Maryland law of abandonment of easements by merely stating that it is so, although the simplicity of the majority's position is subtly contained in the eighty-plus pages of the Court's opinion.

In the Court's departure from long-standing real property principles, the majority in *Matthews v. Amberwood Associates Ltd. Partnership*, 351 Md. 544, 719 A.2d 119 (1998), held that an unenforced "no pets" provision in a lease subjected a landlord to negligence liability for damages sustained by a tenant's guest, who was attacked within the tenant's premises by the tenant's dog. In my view, no prior Maryland case had ever held a landlord liable for the negligence of a tenant where the act complained of and the resulting injuries that occurred to a tenant's guest were completely within the confines of the leased premises.

The law of property, and its related fields such as landlord-tenant law, have been among the most stable areas of the law. In my view, that stability has, over the years, been a positive influence on the law. That body of law now may be perceived by real property practitioners as a field of law under attack as a result of the Court's decisions this term.

In my view, the majority's position is result-oriented. I have no quarrel with the idea that unused railway rights-of-way are potential resources for recreation and environmental protection. The elements of the law of abandonment are, in substantial part, judge-made law [**17] and, while I do not advocate such an approach, this Court presumably has the power to impose prospectively an additional element in respect to the doctrine. Instead of now imposing a new, prospectively applicable element, however, the majority holds that this new element, approval of federal agencies, has always been part of the Maryland law of abandonment. That simply is not so.

Finally, the majority's opinion will leave members of the bar at risk who may have been advising clients on abandonment issues under the traditional cessation of use and evidence of intent standards. We owe it to the bar to acknowledge change, even if it means acknowledging a departure from precedent or from the holdings of prior cases, when change is what the Court is doing.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

97-5079, -5083

THE CHEVY CHASE LAND COMPANY OF MONTGOMERY COUNTY, MARYLAND,
Plaintiff-Appellant,

and

COLUMBIA COUNTRY CLUB,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

and

MONTGOMERY COUNTY,
Defendant-Appellee.

William J. Utermohlen, Oliff & Berridge, PLC, of Alexandria, Virginia, for plaintiff-appellant The Chevy Chase Land Company of Montgomery County, Maryland. Of counsel was Maurice J. Montaldi, Holland & Knight, of Washington, D.C.

Whayne S. Quin, Wilkes, Artis, Hedrick & Lane, Chartered, of Washington, D.C., for plaintiff-appellant Columbia Country Club. With him on the brief were John D. Lane and Paul J. Kiernan.

Sean H. Donahue, Attorney, Environment and Natural Resources Division, Department of Justice, of Washington, D.C., for defendant-appellee United States. With him on the brief were Lois J. Schiffer, Assistant Attorney General, John A. Bryson and Andrew M. Eschen, Attorneys. Of counsel on the brief was Henri F. Rush, General Counsel, Surface Transportation Board, of Washington, D.C. Of counsel were Edward J. Shawaker, Attorney, Appellate Section, Environment and Natural Resources Division, Department of Justice, and Evelyn G. Kitay, Attorney, Surface Transportation Board.

Diane R. Schwartz-Jones, Associate County Attorney, Office of the County Attorney, of Rockville, Maryland, for defendant-appellee Montgomery County. With her on the brief were Charles W. Thompson, Jr., County Attorney, and Marc P. Hansen, Chief, Division of General Counsel.

Appealed from: United States Court of Federal Claims

Judge James F. Merow

United States Court of Appeals for the Federal Circuit

97-5079, -5083

THE CHEVY CHASE LAND COMPANY OF MONTGOMERY COUNTY, MARYLAND,
Plaintiff-Appellant,

and

COLUMBIA COUNTRY CLUB,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee,

and

MONTGOMERY COUNTY,
Defendant-Appellee.

Before MAYER, Chief Judge, NEWMAN, and CLEVENGER, Circuit Judges.

PER CURIAM.

CERTIFICATION ORDER

This case presents the question of whether an uncompensated taking of property in violation of the Fifth Amendment to the United States Constitution has occurred. The answer to that question depends upon complicated issues of Maryland property law upon which this court discerns an absence of applicable and dispositive Maryland law. The

State of Maryland has a procedure pursuant to which this court may certify unsettled questions of state law to the Court of Appeals of Maryland. See Md. Code Ann., Cts. & Jud. Proc. §§ 12-601 to -606 (1997)

Following oral argument in this case on June 3, 1998, this court decided to certify three questions of law to the Court of Appeals of Maryland. The three questions of law pertain to a deed dated March 22, 1911, from Chevy Chase Land Company, as party of the first part, to Metropolitan Southern Railroad Company, as party of the second part, which conveyed an interest in land, the metes and bounds of which are described in the deed.

The questions of law this court hereby certifies to the Court of Appeals of Maryland are:

1. Under Maryland law, did the above-mentioned 1911 deed convey fee simple absolute interest to the party of the second part, or, instead, did the deed convey an easement to the party of the second part?

2. If the 1911 deed conveyed an easement to the party of the second part, as a matter of law is the easement so conveyed subject to any limitations?

3. If the deed conveyed an easement to the party of the second part, has that easement, as a matter of law, been abandoned at any time since its conveyance, and if so, when?

The parties to this case have agreed to a Joint Statement of Facts pertinent to the three certified questions. A copy of the Joint Statement of Facts is attached hereto. Nineteen Exhibits are appended to the Joint Statement of Facts. In addition, the Joint Statement of Facts refers throughout to documents contained in the Joint Appendix to the case filed in this court. A copy of the Joint Appendix is

therefore also attached hereto.

Section 606 of Title 12 of the Annotated Code of Maryland specifies the required contents of a certification order. In addition to the questions certified and the facts relevant to the question or questions, set forth above, this court hereby acknowledges that the Court of Appeals of Maryland, as the receiving court, may reformulate the questions certified by this court. See Md. Code Ann., Cts. & Jud. Proc. § 12-604 (1997).

The names and addresses of the counsel of record to the parties in the case are set forth on page eighteen of the Joint Statement of Facts attached hereto. To the best of this court's knowledge, there are no parties appearing in this case without counsel.

The three questions set forth above are hereby certified to the Court of Appeals of Maryland.

So ordered.

FOR THE COURT

8/18/98
Date

/s/
Jan Horbaly
Clerk

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-248L

(Filed March 10, 1997;
as modified March 19, 1997)

THE CHEVY CHASE LAND COMPANY OF MONTGOMERY COUNTY, MARYLAND,	*	Fifth Amendment Taking; Rails-to-Trails Act 16 U.S.C. §1247(d)
Plaintiff	*	
and	*	
COLUMBIA COUNTRY CLUB, a District of Columbia corporation,	*	
Intervenor-Plaintiff,	*	
v.	*	
THE UNITED STATES,	*	
Defendant,	*	
and	*	
MONTGOMERY COUNTY, MARYLAND,	*	
Third-party Defendant.	*	

William J. Utermohlen, Alexandria, Virginia, for plaintiff. *Maurice J. Montaldi*, Washington, D.C., Of Counsel.

R. Dennis Osterman, Bethesda, Maryland, for Columbia Country Club, Intervenor-Plaintiff.

Andrew M. Eschen, Washington, D.C., with whom was *Assistant Attorney General Lois J. Schiffer*, for defendant. *Evelyn Kitay, Henri F. Rush, Ellen D. Hanson*, Office of the General Counsel, Interstate Commerce Commission, Of Counsel.

Diane R. Schwartz Jones, Rockville, Maryland, for Montgomery County, Maryland, Third-party Defendant.

Andrea C. Ferster, Washington, D.C., for Rails-to-Trails Conservancy, *Amicus Curia*.

OPINION

MEROW, *Judge*.

In this Rails-to-Trails takings case, Plaintiff, the Chevy Chase Land Company ("CCLC" or "the land company"), moved for summary judgment against Defendant, the United States of America and Intervenor-defendant, Montgomery County, Maryland. Both Defendants have tendered cross-motions for summary judgment against Plaintiff, CCLC.

The Columbia Country Club ("the Club" or "CCC") subsequently entered this action as Intervenor-plaintiff and filed a separate motion for summary judgment against all other parties, including Plaintiff, CCLC. Both Plaintiff, CCLC, and Defendant, the United States, countered the Club's motion for summary judgment with cross-motions for summary judgment.

The Rails-to-Trails Conservancy ("the Conservancy") tendered an *amicus curiae* brief in support of Defendants' takings analysis.

Oral argument ensued.

Upon consideration, it is concluded that: (1) Both Defendants' cross-motions for summary judgment against Plaintiff, CCLC, are granted, and Plaintiff's motion for summary judgment is denied; and (2) Columbia Country Club's motion for summary judgment is denied; the cross-motion for summary judgment tendered by Plaintiff, CCLC, is dismissed for lack of jurisdiction; and Defendant's cross-motion for summary judgment against the Club is granted.

I. BACKGROUND

A. Introduction

Plaintiffs have alleged a taking pursuant to the Fifth Amendment of the Constitution[1] resulting from actions taken pursuant to federal legislation known as the Rails-to-Trails Act (the "Act"),[2] 16 U.S.C. § 1247(d).

The taking alleged involves a strip of land approximately one mile long, and 100-feet wide, spanning some 12 acres in Montgomery County, Maryland. The land company

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[1] U.S. Const. Amend V. ("nor shall private property be taken for public use, without just compensation").

[2] The Rails-to-Trails Act was enacted on March 28, 1983, as part of the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, Title II, 97 Stat. 42, 48 (codified at 16 U.S.C. § 1247(d) (1994)). The amendments were appended to the National Trails System Act of October 2, 1968, Pub. L. No. 90-543, 82 Stat. 919 (codified as amended at 16 U.S.C. §§ 1241-51 (1994)).

conveyed this parcel, termed a railroad "right-of-way,[3]" to the Metropolitan Southern Railroad ("MSRR") by deed in 1911. MSRR operated a railroad on this right-of-way up through May 10, 1985.

On April 9, 1986 application was made pursuant to Interstate Commerce Commission ("ICC") regulations for authorization to abandon rail service on the line. *See* 49 CFR 1152.22. The ICC entered a decision on February 25, 1988 permitting abandonment on condition that the railroad maintain the right-of-way for a period of 180 days to enable the acquisition of the right-of-way for public use pursuant to the Rails-to-Trails Act. During this period Montgomery County came forward as a potential purchaser, seeking to use the land for a light-rail system as well as a hiker/biker path within the constraints of 16 U.S.C. § 1247(d), and to postpone abandonment of the railroad corridor. On December 14, 1988[4] the ICC approved the purchase and transfer of use and issued a Certificate of Interim Trail Use ("CITU") pursuant to the Act. The right-of-way property was then conveyed to Montgomery County by quitclaim deed for consideration of $10 million.[5] As a result of the ICC's actions pursuant to the Rails-to-Trails Act, ICC abandonment of the railroad right-of-way was delayed indefinitely.

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[3] This term has two meanings, one referring to a right to use certain land for railroad purposes -- which constitutes an easement, and the other referring to the actual land used by the railroad. *See infra* at 34.

[4] The ICC extended the 180-day time period as per the parties' requests.

[5] A quitclaim deed ". . . purports merely to convey whatever title to the particular land the grantor may have, and its use excludes any implication that [the grantee] has a good title, or any title at all." 4 H. Tiffany, The Law of Property § 959 (3d ed. 1939).

B. ARGUMENTS

The land company initiated the instant takings action in 1992, asserting that it owns the right-of-way strip and that postponement of the railroad's abandonment of the right-of-way obstructed its full fee simple absolute property interest in this strip. CCLC's takings argument has three dependent components. First, CCLC contends that it had originally conveyed the parcel to MSRR as an easement for the purpose of operating a railroad, and that CCLC retained title to this strip in fee simple absolute during the time MSRR used it for railroad operations. Second, CCLC asserts that MSRR's termination of railroad service caused the railroad easement to lapse and, as a result, a reversion occurred and CCLC now possesses unencumbered title. Third, the land company maintains that the ICC's authorization of Montgomery County's purchase of the right-of-way effected a Fifth Amendment taking of its property, because the federal regulatory sanction of the County's use constitutes a physical and regulatory invasion and causes an expansion in scope of the original railroad easement.

Defendants, the United States and Montgomery County, assert that CCLC actually conveyed the right-of-way to MSRR in fee simple absolute. By doing so, they maintain, the land company fully relinquished its title and any interest it had in the land at issue back in 1911, the date of conveyance. As a result, CCLC had no interest in the land in 1988, when the CITU issued. Accepting this formulation, CCLC's other arguments need not be considered. Defendants proceed to assert alternatively that even had the 1911 deed conveyed only an easement to MSRR, the easement never lapsed, because neither the railroad nor Montgomery County had abandoned it, as a matter of law. Defendants contend that even had the easement been abandoned, no Fifth Amendment taking has occurred because CCLC held no

compensable expectancy to a reversion due to the highly regulated nature of the railroads.

On summary judgment, Intervenor-plaintiff, the Columbia Country Club, asserts that it, too, has suffered a taking of its property within the right-of-way. The Club claims to have interests in a portion of the 100-foot wide strip extending some 1,686 feet and totalling approximately 3.89 acres. The Club alleges that it used this property as part of its golf course. The Club asserts that it acquired fee simple absolute title to the majority of these 3.89 acres by adverse possession. The Club also contends that it has certain easements within the railroad corridor. The introduction of a hiker/biker trail, as well as a highly-trafficked light-rail system pursuant to the Rails-to-Trails Act, the Club maintains, will effect a taking of the property in which it has an interest within the right-of-way, as well as that within its surrounding golf club.

All other parties oppose the Club's position, stating that the Club has acquired neither fee simple absolute, nor a lesser property interest of an easement in the strip, because the Club enjoyed permissive use. Even if the Club had a property interest in the strip, Plaintiff and Defendants assert that no taking may have occurred because the Club had no reason or right to expect that use of the railroad right-of-way would continue exactly as it existed in the early part of this century, when the Club obtained the land for its golf course.

C. Railroad Regulatory Framework

Prior to 1920, the Maryland legislature regulated all railroad transactions within the state. Regulatory oversight commenced with the railroad's legislative charter or certificate of incorporation which proscribed the railroad's authorized uses of its right-of-way. *See Public Service Comm'n of Maryland v. Phila., B. & W. R. Co.*, 122 Md. 438,

89 A. 726 (1914) (hereinafter "*PSC of Md.*"); 1870 Md. Laws ch. 476 (requirement for legislative charter removed; incorporation permitted pursuant to provisions of act). Various legislation further limited railroads' actions. *See e.g.* 1870 Md. Laws ch. 362 (taxes); 1874 Md. Laws ch. 446 (train passage over connecting railroads); 1870 Md. Laws ch. 476 (for the "creation and regulation" of incorporated railroad companies). In 1910, Maryland enacted legislation establishing a state administrative agency, called the Public Service Commission, to regulate railroad transactions. *See* 1910 Md. Laws ch. 180, § 26 1/2 ("No common carrier, railroad corporation, or street railroad corporation shall . . . exercise any franchise or right under any provision of the railroad law, or of any other law not heretofore lawfully exercised, without first having obtained the permission and approval of the commission.") This provision specifically applied to abandonment. *See* 1914 Md. Laws ch. 445, § 1, cited in *Benson v. Maloy,* 141 Md. 398, 118 A. 852, 854 (1922) ("The provisions . . . empowering the commission to grant such permission and approval . . . after due hearing . . . shall likewise apply to the **abandonment or discontinuance** in whole or in part by any common carrier, railroad corporation. . . .") (emphasis added).

From 1920 forward, the federal government has retained exclusive jurisdiction over the interstate operation of this nation's railroads beginning with the enactment of the Transportation Act of 1920 ("1920 Act"). This Act granted the ICC exclusive and plenary jurisdiction over abandonment, construction and operation of the nation's interstate railroad lines. *See Transit Comm'n v. United States,* 289 U.S. 121, 127 (1933). The 1920 Act provided,

> (18) . . . no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have

> been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

Transportation Act of 1920, Ch. 91 tit. IV, Sec. 402, § 1(18), 41 Stat. 474, 477-78 (1920).

The abandonment provision of the 1920 Act was reformulated in 1976 as part of the Rail Revitalization and Regulatory Reform Act. Pub. L. No. 94-210 tit. VIII, § 802, 90 Stat. 125, 127-130 (1976) (codified as amended at 49 U.S.C. § 10903). Under this legislation abandonment or discontinuance of a railroad line was subject to an ICC finding that ". . . the present or future public convenience and necessity required or permitted . . ." such act. 49 U.S.C. § 10903(a). An order authorizing abandonment allowed a carrier to terminate service on a line, and the line, at that point, was no longer part of the national rail transportation system. 49 U.S.C. § 10903(b)(1); *Preseault v. ICC,* 494 U.S. 1, 5-6 n.3, (1990). Discontinuance, in contrast, allowed a rail carrier to cease active operations on its line for an indefinite period without departing from ICC jurisdiction and the national rail transportation system. Id. The 1976 Act's discontinuance provisions also provided for the ICC to delay a railroad's disposition of lines proposed for abandonment for 180 days after issuance of an ICC abandonment decision. 49 U.S.C. § 10906.

In 1983, Congress enacted the Rails-to-Trails Act, which added section 8(d) to the National Trails System Act. *See supra* n.2. Pub. L. No. 98-11, § 208, 97 Stat. 42, 48 (1983) (codified at 16 U.S.C. § 1247(d) (1988) ("the Rails-to-Trails Act"). One of the purposes of this amendment was the preservation of established railroad rights-of-way for reactivation in the future. The provision provides in part,

" . . in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service . . . in the case of interim use of any established railroad rights-of-way . . . such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such right-of-way for railroad purposes. **If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use**" (emphasis added).

By enacting this section, Congress provided that potential interim trail use would be considered prior to abandonment of rail lines, and that such use would not constitute abandonment under state law.

Under the regulations which implement the 1983 Rails-to-Trails Act, the ICC was to issue a Certificate of Interim Trail Use (CITU) to allow a carrier to negotiate an agreement with a public or private organization willing to assume responsibility for the right-of-way, and under circumstances where "the public convenience and necessity permit abandonment." 49 C.F.R. § 1152.29(b)(1)(ii). If an agreement was reached, section 1247(d) treated interim trail use as a discontinuance which preserved ICC jurisdiction over the right-of-way, rather than an abandonment which would terminate ICC jurisdiction and cause any right-of-way held as an easement to revert to the owner of the underlying

estate in fee simple. During the interim, the rail corridor was to be held in a national "rail bank," subject to ICC control, for future rail use.[6]

D. Historical Context of Right-of-Way Conveyance

Plaintiff's Fifth Amendment taking claim with respect to the right-of-way is premised upon the following facts. Plaintiff, the Chevy Chase Land Company, incorporated on June 6, 1890 under the direction of Francis G. Newlands, a developer who would subsequently become a United States Representative and then Senator from Nevada.[7] Newlands established the CCLC as a vehicle to develop a neighborhood situated on either side of the District of Columbia's northwestern border which would come to be known as Chevy Chase. By 1890, Newlands' land company had amassed some 1712 acres of land for this planned community.

CCLC was but one of Newlands' development projects. Prior to and throughout his tenure in Congress, Newlands spearheaded the planning and development of several residential communities throughout the country.[8] As a member of the House Ways and Means Committee and the Senate Committee on Interstate Commerce, he worked on the development of an interstate transportation network to facilitate the development of his projects.

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[6] Congress subsequently passed the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which recodified the ICC's responsibilities concerning abandonments and discontinuances and transferred those responsibilities to a newly created Surface Transportation Board. The Act, which has a savings clause for suits initiated before December 29, 1995, is not applicable to the case at bar.

[7] Newlands served in Congress from 1893 until his death in 1917.

[8] See generally, Albert W. Atwood, Francis G. Newlands' A Builder of the Nation, (1969), p. 29-39.

To provide access to Chevy Chase, Newlands and CCLC forged relationships with several railroad companies, including the MSRR. In 1890, MSRR incorporated and acquired the right to run a railroad on the Maryland portion of an approximately seven-mile B&O spur line known as "the Georgetown Branch." MSSR incorporated in 1890, and subsequently became a subsidiary of the Baltimore and Ohio Railroad ("B&O"), which was owned by the Chessie System Railroads, a unit of CSX Corporation.[9] The spur line departed the main B&O line just northwest of Silver Spring (at "Georgetown Junction" or "Linden Station"), and extended across Montgomery County, Maryland to the District of Columbia boundary at a point near the Potomac River. The line then ran along the Potomac into Georgetown. About a mile of the line traversed CCLC property, on either side of Connecticut Avenue, near Chevy Chase Lake and just north of the endpoint of the Rock Creek Railroad.

On March 4, 1891, the land company adopted a resolution deeming it ". . . advisable and to be for the benefit . . ." of the company to have this [MSRR] railroad line cross its property. Accordingly, on April 21, 1891, the land company and MSRR executed a Memorandum of Agreement ("1891 Agreement) proposing a conveyance of real property to the latter for the contemplated railroad.[10] It provided,

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[9] A July 1, 1909 Agreement memorialized the relationship between the two railroad companies. MC S. J. Mot. Exh. 26 (B&O "is the owner of the entire capital stock of [MSRR] and said railroad has been operated and managed for a number of years past as a part of the Baltimore and Ohio Railroad. . . .").

[10] As an incorporated railroad MSRR possessed the authority to condemn the land for its railway, and actually acquired much of it through the exercise of its condemnation power. See FDA 114 - 126.

> The Metropolitan Southern Railroad Company contemplating the construction of a line of road in connection with its Metropolitan Branch, to be known as the Metropolitan Southern Railroad, to traverse certain lands, the property of the Chevy Chase Land Company, as hereinafter appearing, the said Chevy Chase Land Company **in consideration of the agreement of the said railroad company hereinafter set forth,** agrees to donate and convey a right of way 100 feet wide. . . . And the said Land Company for the consideration aforesaid further agrees to donate and convey to the said Railroad Company for the purposes of a passenger and freight depot, and uses incident thereto, including side tracking, the following described parcel of land, designated for the purposes of this agreement as Parcel A . . ., containing 0.9 acres more or less.
>
> * * * * *
>
> **And in consideration of the aforesaid agreement of the said Land Company, the said Railroad Company agrees to erect upon the said parcel "A" a passenger station, to cost not less that $4,000** or to contribute the sum of $4,000 towards the erection by said Land Company of such passenger station on said parcel "A" and also the said railroad Company, for the consideration aforesaid, agrees to give said Land Company the right to connect its power house or power houses by a siding or sidings to said railroad Company's tracks. . . .

1891 Agreement (emphasis added).

According to the 1891 Agreement, MSRR would construct its "tracks from the Metropolitan Branch [of B&O railroad in Silver Spring] . . . to Connecticut Avenue extended from the District of Columbia, on or before the 31st

day of August, 1891." MSRR also promised to give the land company the right to connect power houses by sidings to MSRR's tracks. On the same day the 1891 Agreement was executed, the parties executed a separate agreement in which MSRR granted CCLC half-price rates on its transportation of railroad freight on the Georgetown Branch.

By 1892 MSRR had completed part of the line, from Georgetown to Chevy Chase Lake. Building then ceased and MSRR eventually completed the line and commenced service in 1910.

MSRR never built the depot contemplated by the 1891 Agreement, deciding instead to construct a freight siding on the depot tract. During the interim, the Rock Creek Railroad built a passenger depot just to the south of the tract apportioned for the depot in the 1891 Agreement.

After construction of the railroad had been completed in 1910, the land company and the railroad revised their original agreement and the land company conveyed the right-of-way by a 1911 deed. A letter of December 20, 1910 from a land company official[11] to one Mr. J.D. McCubbin, Jr. of the B&O referenced this agreement. The letter provided,

> I have had a long talk with Senator Newlands, President of the Chevy Chase Land Company, and have succeeded in getting his consent to the arrangement suggested by you sometime during the past summer.
>
> This arrangement was that the Baltimore and Ohio Railroad pay to the Chevy Chase Land Company Four Thousand Dollars in cash, and in consideration of this payment, have conveyed to it, all the property covered by its right of way contract with the Land Company, entered into some years ago, the building of a Passenger Station

[11] The letter was on land company stationery and was unsigned.

as required by said contract, to be waived by reason of the Four Thousand Dollar payment above referred to.

The parties then executed a deed on March 22, 1911, which they would record on April 4, 1911. The granting clause stated,

> . . . the said party of the first part [the land company] for and in consideration of the sum of FOUR THOUSAND (4,000) DOLLARS, to it paid by the said party of the second part, does hereby grant and convey unto the said party of the second part [MSRR], its successors and assigns, a free and perpetual right of way, one hundred (100) feet wide, over the land and premises hereinafter designated as "Parcel A" and does hereby grant and convey unto the said party of the second part [MSRR], its successors and assigns, in fee -- simple, the land and premises, hereinafter designated as "Parcel B". . . .

The right-of-way, or Parcel, A in the deed, was described by metes and bounds, and was summarized as a ". . . parcel being a strip of land fifty (50) feet wide on each side of the center line of the Metropolitan Southern Railroad through the land of the Chevy Chase Land Company. . . ." Parcel B was described by metes and bounds as well.

The deed's warranty clause stated,

> AND the said party hereto of the first part hereby covenants to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite.

Additionally, the deed provided that upon its signing the April 21, 1891 Memorandum of Agreement would be void and that the parties' full agreement would be embodied within the deed. It stated,

> . . . the contract and agreement entered into on the Twenty-first day of April, 1891 . . . is mutually abrogated, canceled and set aside, and [MSRR], is hereby released and discharged from the obligation set forth in said contract, of erecting a passenger station to cost not less than Four Thousand (4,000) Dollars, or of contributing the sum of Four Thousand (4,000) Dollars toward the erection by the said [CCLC], of a passenger station on the hereinbefore described parcel of land designated as Parcel "B"; and the said [MSRR], as is evidenced by its acceptance of this conveyance, hereby releases [CCLC], from any obligation . . . to erect or cause to be erected the passenger station aforesaid.

The only reference to a restriction on MSRR's use of the parcel comes at the end of a paragraph delineating its metes and bounds. It states that use was "subject to [an] existing right of way for highway and other purposes over what is known as Connecticut Avenue Extended."

E. CCLC's Additional Railroad Ventures

Before the land company had incorporated and during the years ensuing from 1891 until the Georgetown Branch became operational, Newlands and CCLC had begun arrangements for additional railroad access to Chevy Chase. Newlands was instrumental in the establishment of the Rock Creek Railway Company of the District of Columbia ("Rock Creek RR") trolley line, which ran from the downtown area of the District of Columbia, and up Connecticut Avenue to Chevy Chase. Newlands became its president and acquired a controlling interest in the line in 1890. CCLC and the Rock Creek company owned and operated this line as a joint venture which became operational in September, 1892. Although CCLC conveyed its interest in the railway to Rock Creek RR in December, 1892, it continued to depend closely

upon the trolley line for transporting residents to and from the new community.[12]

Next, on November 8, 1894, the Land Company executed a deed to the Chevy Chase and Kensington Electric Railway Company of Montgomery County, Maryland conveying a limited right for railroad use of CCLC's land. The lease contained specific provisions concerning how the land would be used and directing that the right-of-way would lapse in the event the property were not used for railway purposes. The language of the deed provided,

> [the land company] for consideration of Five Dollars . . . conveyed . . . unto the said [railroad company] its successors and assigns a right of way over. . . . A strip of land 25 feet wide . . . subject to the following provisos, limitations and conditions. The said [railroad company] shall construct and complete and commence regularly operating within nine months hereafter an electric railway. . . . If the said [railroad company] . . . shall thereafter fail to continuously operate said railway as an electric railway the interest of the said [railroad company] in the right of way hereby conveyed shall at once cease and determine and the same shall therefrom revert to [the Land Company], its successors and assigns. . . .

FDA at 5-7.

On April 14, 1896, CCLC executed a deed to the Glen Echo Railroad Company of Montgomery County, Maryland, similarly containing specific conditions limiting the usage of the land and providing for reversion in case the railway failed to meet those conditions. In the deed CCLC discussed

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[12] In 1895 Rock Creek RR merged with the Washington and Georgetown Railroad Company creating the Capital Traction Company.

the conveyance of ". . . a right of way **for the purpose of constructing and operating the railroad.** . . ." FDA at 8-12 (emphasis added). It further provided, "the said right of way shall only be used and occupied by the said railroad company as a right of way for an Electric railroad, and for no other purpose or service whatsoever. . . ." Id. Additionally, the consideration for this exchange stated by the railway was one dollar plus the agreement that all of the "actual residents located along the right of way" would be able to ride the railroad for free. Id.

CCLC arranged for and granted interests in its land to entities other than railroads, as well, while instituting conditions for reversions and preserving the underlying fee simple estate. On November 2, 1892, the land company filed conditions for the dedication of land for public roads and parks with the Clerk for the Circuit Court of Maryland. Again, on July 18, 1896, the Land Company dedicated land to the Board of County School Commissioners of Montgomery County for the construction of a schoolhouse, containing specific provisions restricting the usage of the property to a schoolhouse, and that the failure to maintain a school on the land would forfeit the interest and cause a reversion to the land company.

F. Span of MSRR Line Use

From 1911 through 1985, MSRR and its successors and assigns have used and controlled the right-of-way. Rail operations fluctuated throughout the railroad's life from 1911 until 1985. By the early 1980's, use had decreased to an average of two trains per week. Over the years, the railroad was used primarily for hauling freight, and for occasional

site-seeing excursions as well as for the transport of troops during the Korean War.[13]

During MSRR's operational period, CCLC leased portions of the right-of-way from CSX, MSRR's parent corporation. On November 15, 1973, the Land Company leased for an annual rent of $50 plus reimbursement of all taxes assessed upon a "rectangularly shaped parcel of land containing . . . approximately 10,304 square feet, situated south of Lessor's track and east of Connecticut Avenue." The lease provided that "Lessee [CCLC] shall not at any time own or claim any right, title or interest in or to the premises." By 1982, CSX indicated that it would increase the rent. In response, on June 30, 1982, the land company offered to pay $50 per month plus "any real estate taxes that might be levied on this property." On August 2, 1982, the land company agreed to increase its payments from $50 per year to $750 per year and otherwise keep the original lease intact.

The parties executed an additional agreement on November 15, 1973 providing that CCLC would obtain a private pedestrian crossing agreement "for the purpose of ingress and egress to Licensee's office building." Again, the land company was denominated as the "licensee" in the agreement.

Over these years, CCLC was not assessed and did not pay any property taxes on the strip of land at issue in this case. Nor did it ever list Parcel A as a corporate asset in its financial reports.

In the early 1980's, the railroad took several actions to indicate that service would be terminated upon the Georgetown Branch. In 1983 the railróad posted notice on

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[13] See Herbert H. Harwood, Jr., Impossible Challenge -- The Baltimore and Ohio Railroad in Maryland (1979) at 334.

lines of a future intent to abandon within three years. (At the time only two entities still were using the railroad for the hauling of freight.) On August 13, 1984, an internal memorandum was circulated within the railroad which provided that the Georgetown Branch would be abandoned and that plans for bridgework would be abandoned. In 1985, CSX terminated operations on the Georgetown Branch, due to the need for major repairs to a railroad trestle over Rock Creek. Subsequent to resolving to seek federal regulatory permission to abandon their rail line, on April 9, 1986, MSSR and B&O, as part of the CSX corporation, filed an application with the ICC, seeking to abandon their common carrier obligation to maintain the Georgetown Branch.

On February 25, 1988, the ICC issued a decision finding abandonment of the line appropriate should no offer for continued rail operations be received, and to allow CSX a period of 180 days to enter into negotiations with the government of Montgomery County for a transfer of the Maryland portion of the Georgetown Branch pursuant to 16 U.S.C. § 1247. Within the decision, the ICC acknowledged that use of the line had declined 91.1% from 1969 through 1985. See generally Plaintiff's Appendix at A-112-125, ICC Docket No. AB-19 (Sub-No. 112), February 25, 1988. ["A-__"]. The ICC also noted that there were two remaining users of the railroad in 1985, and that both had contracted with CSX to receive their deliveries by truck. Id. Further, it indicated that repair of the railroad alone would cost some $573,000. Id.

On November 22, 1988, Montgomery County and CSX reached an agreement. The ICC then issued a Certificate of Interim Trails Use "CITU" on December 14, 1988 permitting Montgomery County's proposed uses of the rail corridor pursuant to 16 U.S.C. § 1247(d). As contemplated by the CITU, CSX and subsidiaries conveyed the Maryland portion

of the Georgetown Branch to Montgomery County by quitclaim deed on December 16, 1988 for $10 million.

The County submitted its Georgetown Branch Light Rail Feasibility Study -- its plan to institute a combined recreational trail and light railroad over the strip of land at issue -- to the Maryland Legislature in January, 1989, which was adopted in November 1989. By 1990, the State of Maryland agreed to contribute up to $70 million for construction of the project. As of January 1991, the State estimated that the trolley would cost $183.2 million. The parties have indicated that the proposed combined project has not yet been fully implemented.

G. Columbia Country Club's Relationship With the Right-of-Way

The Club's takings claim stems from the following facts. In summer 1909, the Club[14] chose two parcels of land in Chevy Chase, one measuring 39.311 and another 89.459 acres, totalling 128.77 acres combined, as the site for a clubhouse and golf course. The two parcels were located to the north and south of the 100-foot wide right-of-way at issue in this case, and were owned by CCLC at the time. However, MSRR was already in possession of the right-of-way pursuant to the 1891 Agreement. MSRR would, as stated above, receive a deed from CCLC conveying this right-of-way in 1911.

As the land the Club sought to purchase would be bisected by MSRR's right-of-way, on June 26, 1909 the Club entered into what appears to be an option contract with CCLC which conditioned the sale of the two parcels upon the Club's ability to obtain permission from B&O Railroad

[14] Formerly known as the Columbia Golf Club, the Columbia Country Club incorporated under this new name on August 25, 1909.

(MSRR's parent company) to cross MSRR's tracks. Plaintiff's Supplemental Appendix at 51 ("SA-__"). The parties located among CCLC's records an undated document referring to this agreement. It provides,

> All the conditions of the option dated June 26, 1909, given by F.G. Newlands, President, Chevy Chase Land Company, to Columbia Golf Club, to be carried out unless changed by this contract. The sale is made on condition **that permission can be obtained by the Columbia Golf Club from the Baltimore & Ohio Railroad Company to cross its tracks which run through the property covered by this contract** which is necessary to make the property valuable for a Golf Course.

SA-51 (emphasis added).

The Club contends that "Senator Newlands, [then] President of the CCLC, advised [the Club] to secure the right to cross over the right-of-way so that [the Club] could build its golf course and the CCLC could sell the land to [the Club] for such purpose." Columbia Country Club's Proposed Findings of Uncontroverted Facts, citing Club Brief Appendix at 6, 26 ("CBA-__"). [15]

On November 11, 1909, the Club and MSRR executed such an agreement. It provided,

> WHEREAS, the said Columbia Country Club is the owner of certain land situated near Chevy Chase, in the County of Montgomery, State of Maryland, and **contemplates the location and maintenance on a portion thereof of a golf course,**

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[15] The Club has not produced evidence of Mr. Newlands' so advising the Club.

AND WHEREAS, **the said Metropolitan Southern Railroad owns and maintains a right-of-way, road-bed and track running through and across the said land of the said Columbia Country Club,**

AND WHEREAS, the said Columbia Country Club is desirous of obtaining and securing from the said Metropolitan Southern Railroad Company a permission, license or privilege for the members and guests of said Columbia Country Club and caddies and servants in the employment of said members and guests, and other agents and employees of said Club, **to go upon, over and across the said right-of-way, road-bed and tracks of said Metropolitan Southern Railroad Company during the day time, and at such points thereon as may be hereafter agreed upon by the parties hereto in writing.**

NOW THIS AGREEMENT WITNESSETH, that for and in consideration of the payment of Five Dollars to the said Columbia Country Club by the Metropolitan Southern Railroad Company, and the **grant by said Metropolitan Southern Railroad Company unto the said Columbia Country Club of the permission, license and privilege hereinbefore set forth**, the said Columbia Country Club will, and does hereby, assume all risk of loss, damage or injury to its members, guests, caddies or employees, as hereinbefore described, while using, crossing or upon said right-of-way, road-bed or tracks of the said Metropolitan Southern Railroad Company, and hereby releases the said Metropolitan, its successors and assigns, from all claim from loss, damage or injuries sustained by said Columbia Country Club, its employees, guests, or the caddies or servants employed by said Columbia Country Club, or its guests, whether caused by the negligence of said Metropolitan Southern

> Railroad Company, its agents, employees or otherwise, and the said Columbia Country Club does hereby covenant to save harmless and indemnify the said Metropolitan Southern Railroad Company, from and against all claims, or demands, costs and expenses of any kind by reason of any accident, injury, damage or loss of life to its members or guests, or their caddies or employees whatsoever, which may arise in any way from the **use or crossing of said right-of-way, road-bed or tracks**, or through the negligence, carelessness or other acts of the said Columbia Country Club, its officers, agents, guests, caddies or employees.

1909 Agreement, CBA-27, 28 (emphasis added).

After this agreement had been signed, on November 22, 1909, CCLC conveyed the two parcels of land to the Club. The deed provided,

> . . . the land and premises hereby conveyed shall only be used for the purpose of a Golf Course and Club grounds, . . . [and CCLC] hereby covenants to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite.

Id. at 34. The deed was recorded among the land records of Montgomery County.

The Club opened its golf course on these two parcels in January 1911. A few years later, in 1913, CCLC conveyed additional smaller parcels to the Club situated adjacent to the parcels conveyed in 1909. On November 24, 1913, yet another four parcels were conveyed totalling 4.138 acres. Montgomery County Opp'n to Club S. J. Mot. Exh. A-1. ["MC Opp. Exh. __"].

The Club's board of governors minutes from 1914 reflect that one "Dr. Harban [a board member] was authorized to

enter into arrangements with the officials of the B. & O. R.R., for the purpose of securing right of way across their tracks, with the understanding that the R.R. Co. would not be held liable for any . . . accidents that might occur." Federal Defendant's Appendix 128-30, Minutes of May 20, 1914.

The Club obtained additional parcels from CCLC in later years. By deed dated October 29, 1919, CCLC conveyed to it an additional parcel of approximately three-fourths of an acre. On July 3, 1940 the Club obtained three additional small parcels from CCLC which also bordered upon the right-of-way. CBA-1, 36; SA-64. By 1940, the Club had acquired a total of approximately 145.35 acres, its current landholding.

At present, there are four paths crossing the tracks on the right-of-way. Two of them were created to connect the two large parcels comprising the original golf course. The other two -- both located to the west of Tee #2 -- were created subsequent to 1940, when the Club acquired additional parcels west of Tee #2 and lying to the north of the tracks, to connect existing portions with the newly acquired portions of the course. See SA-64-66, July 1940 Deed (conveyance of Parcel B north of the tracks and west of the land conveyed in 1909); CBA-36 (1940 conveyance labeled as Parcel B and Liber 792 folio 001). Club affidavits attest that one of these post-1940 crossings has been in use since approximately 1962, see CBA-36, CBA-43, and that Club members remember the use of all three other crossings since the 1930's. *See* CBA-73-74, Gott Affid.; CBA-69-70 West Affid.; CBA-49-50.

The Club's proffered affidavits contain statements from members, employees and surveyors attesting to the veracity of its survey map and indicate that the members, guests, agents and employees of the Club have utilized these crossings as well as other parts of the 100-foot right-of-way.

See CBA-43 (Mr. Budd); CBA-46 (Mr. Robinson); CBA-49 (Mr. Walker); CBA-65 (Mr. Davis); CBA-69 (Mr. West). The Club's asserted uses of the right-of-way include: (1) waking and riding golf carts upon the crossing paths over the tracks and upon the adjacent land; (2) Club employees' landscaping, spraying foliage and trimming brush, grass and weeds along and upon the right-of-way; CBA-43, CBA-36, and (3) the extension and placing of tees and greens within the right-of-way. CBA-49, CBA-36; SA-17, Farr Affid. ¶10.

Throughout the years, the Club has not been assessed or paid property taxes on any portion of the right-of-way. SA-24, Club Int. Answer No. 9; MC Opp. Exh. 1, 2 (county tax valuation maps 1919 and 1967).

In the early 1980's, Club counsel wrote to CSX apparently seeking another agreement concerning the Club's use of the right-of-way. In a 1982 letter counsel referred to a meeting between Club counsel and CSX and also made reference to the uncovering of the 1909 agreement. The letter provides,

> This has reference to Mr. Spencer's meeting with Mr. Trotman [Club counsel] on June 29 and your telephone conversation with Mr. Spencer on July 2 concerning Railroad property being used by members and guests of the Columbia Country Club at Chevy Chase, Maryland.
>
> Upon further research of our corporate records, Mr. Spencer located an old agreement dated November 11, 1909 between the B&O and the Columbia Country Club. In view of this agreement, a new one will be unnecessary.

MC Opp. Exh. 4, July 8, 1982 Letter from J. Trotman to CSX.

In the mid-1980's, at approximately the same time that MSRR and B&O had expressed an intent to petition for abandonment or discontinuance of rail service upon the right-of-way, the Club attempted to secure continued passage over the right-of-way. In 1986 counsel for the Club initiated contact with CCLC and CSX inquiring as to the nature of the ownership of property rights on the right-of-way.

In February 1986 counsel wrote to CCLC,

> [i]t is conceivable that the right of reverter would return the property to the Chevy Chase Land Company in the event that the railroad abandons its right-of-way.

SA-21, February 19, 1986 letter from K. W. Parkinson to CCLC.

Again, in August 1986, apparently under the belief that CCLC had title to the right-of-way, counsel for the Club wrote to CCLC requesting "to acquire . . . its right of reverter for that portion of the right-of-way which transits the Club property." SA-20, Aug. 11, 1986 letter from K. W. Parkinson to CCLC. CCLC counsel asserts that Club counsel had been in contact with the land company "over a period of a year to eighteen months," around this time and that Club counsel "never suggested that the Club had any title interest in the right-of-way whether by adverse possession or otherwise. SA-18-19, Farr Affid.

Additionally, in April 1986 Club counsel wrote to CSX:

> [W]e . . . are very much concerned about the rights of the parties related to the railroad right-of-way through the golf course. . . . We would like to explore all avenues so as to protect the beautiful golf course at the Club. As far as I know, the relationship between the railroad and the Club has always been friendly and mutually supportative [sic] throughout its long 76 year history.

MC Opp. Exh. 5, April 18, 1986 letter from K. W. Parkinson to CSX.

Montgomery County's planned light-rail and hiker/biker trail will traverse the right-of-way running through the Club's golf course and will require the Club to relocate certain tees, holes and greens. In the Maryland Department of Transportation Evaluation Report on the Montgomery County Georgetown Branch Trolley/Trail Project of January 15, 1991, the county provides that "[w]ithin the Country Club, the vertical alignment of the trolley will be raised approximately five feet to provide for golf cart underpasses which allows for movement between the greens north and south of the alignment." The report also provides, "[o]n the eastern edge of the Country Club, the tournament tee at holes Nos. 15 & 18, which are within the existing railroad ROW (right-of-way), must be relocated or abandoned. Greens at holes 14 & 17 must also be modified."

II. STANDARD OF REVIEW

All four parties in the instant case have moved for summary judgment, each asserting that there are no material issues of fact genuinely in dispute with regard to whether a taking with respect to CCLC or the Club has occurred. Each concludes that judgment is thus appropriate as a matter of law.

When presented with cross-motions for summary judgment, the court must evaluate each party's motion on its own merits. *Prineville Sawmill Co. v. United States,* 859 F.2d 905, 911 (Fed. Cir. 1988) (*citing Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987). Cross-motions are simply a claim by each party that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not establish that if one is rejected the other must necessarily be allowed. *Bataco*

Indus., Inc. v. United States, 29 Fed. Cl. 318, 322 (1993), *aff'd* 31 F.3d 1176 (Fed. Cir. 1994).

A movant will be entitled to summary judgment when, under the governing law, there are no disputed issues of material fact. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986); *Jay v. Secretary, DHHS,* 998 F.2d 979, 982 (Fed. Cir. 1993). Material facts are those which will significantly affect the outcome of a suit under the governing law. *Anderson,* 477 U.S. at 248.

The moving party bears the initial burden of demonstrating the absence of all genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986), *cert. denied,* 484 U.S. 1066 (1988). Once the moving party has made a sufficient showing, then the burden shifts to the non-moving party to present facts evidencing a reasonable dispute as to any material factual issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986), *cert. denied,* 481 U.S. 1029 (1987); *see also J.P. Emco v. United States,* 1996 U.S. Claims LEXIS 167, No. 90-617T, 1996 WL 751363 at *11 (Fed. Cl. Sept. 18, 1996) (citing *Lujan v. National Wildlife Federation,* 497 U.S. 871, 888 (1990) (legal conclusions alleged by non-movant insufficient to preclude summary judgment). All factual inferences will be held in favor of the non-moving party. *Matsushita,* 475 U.S. at 587 (1986).

Moreover, summary judgment will be appropriate when the material facts are adequately developed in the motion papers, such that a full trial will be useless because additional evidence could not reasonably be expected to change the outcome of a case. *Brown v. United States,* 30 Fed. Cl. 23, 26 (1993) (*citing Pure Gold, Inc. v. Syntex (U.S.A.), Inc.,* 739 F.2d 624, 626 (Fed. Cir. 1984)).

III. DISCUSSION

A. Ripeness/Statute of Limitations

Before addressing the various elements of the parties' substantive takings arguments, the issue of whether this matter was brought within the applicable six-year statute of limitations as provided in the Tucker Act, 28 U.S.C. § 1491, will be addressed *sua sponte* as it presents an issue requiring clarification.

Determination of the date upon which a taking claim accrues requires consideration of each element of the taking claim as it relates to the facts of the particular case. *See e.g., Preseault v. United States,* 100 F.3d 1525, 1538 (Fed. Cir. 1996). In certain takings cases, the mere enactment of legislation has effectively deprived an owner of his property, and commenced the running of the statute. *See Alliance of Descendants of Texas Land Grants v. United States,* 37 F.3d 1478, 1482 (Fed Cir. 1994), *cited in Fallini v. United States,* 56 F.3d 1378, 1380 (1995), *cert. denied* 116 S. Ct. 2496 (1996). In those cases, the relevant statute did not set forth contingencies upon which the parties' property might be taken in the future, but rather, the very enactment of the statute caused the deprivation. *See e.g. Alliance of Descendants,* 37 F.3d at 1482 (property interest in cause of action accrued on passage of Treaty precluding such actions); *Maniere v. United States,* 31 Fed. Cl. 410, 421 (1994) (bank with vested right in property affected by passage of FIRREA, OTS banking statute and related regulations); *Whitney Benefits Inc. v. United States,* 18 Cl. Ct. 394, 406-07 (1989), *op. corrected,* 20 Cl. Ct. 324 (1990), *aff'd* 926 F.2d 1169 (Fed. Cir.), *cert. denied,* 502 U.S. 952 (1991) (denial of mining permit would not fix cause of action because statute forbid coal mining "from its very inception").

In contrast, in the instant matter, as in *Preseault*, another case arising out of the operation of the Rails-to-Trails Act, passage of this 1983 statute merely created a regime within which a taking could occur under certain specific factual circumstances and could therefore not fix the statute of limitations for a takings action.[16] *Preseault,* 100 F.3d at 1538-39. The Preseault court stated that the enactment of broad legislation authorizing a federal agency to engage in future regulatory activity is not the type of government action that alone supports a taking claim. *Id.* (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264 (1981)). A taking cannot occur under 16 U.S.C. § 1247(d) until either (1) a railroad effects an abandonment of a railroad easement under state law but the reversion to the fee owner is obstructed by way of federal statute, and/or (2) an approval of a plan for a hiker/biker trail which would burden a right-of-way with an additional servitude. *See e.g. Preseault,* 100 F.3d at 1538-39. Only at either of these two points would the implementation of the Rails-to-Trails Act actually cause a taking of property of an underlying fee owner. *Id.* Likewise, if CCLC's contention is correct -- that it has retained ownership of the underlying fee to MSRR's former right-of-way -- then a taking could occur either at the point of abandonment under state law, or, even if there has been no abandonment, the point at which the land was

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[16] Nor could the previous railroad legislation -- including the Transportation Act of 1920, ch. 91; 41 Stat 456 (1920); or the Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); 49 U.S.C. §§ 10101 *et. seq.* While the 1920 Act constituted broad general legislation authorizing the regulation of railroads by the federal government, the 1976 Act contained authorization for the ICC to order a railroad, proposing to dispose of an unneeded right-of-way, to first offer it for sale for "public purposes." 49 U.S.C. § 10906 (1994).

asserted to have been burdened by an additional servitude of a hiker/biker trail.

However, the statute of limitations does not start to run until there has been an administrative determination and assignment to a hiker/biker trail. *See id.* Only then will the taking claim be ripe for determination. The Preseault court expressed the underlying rationale by explaining that "until the ICC makes the administrative decision to convert an unused right-of-way to a trail, rather than simply permit abandonment, and finds an appropriate public agency to operate the trail, a landowner's suit for a taking would run afoul of established requirements for exhaustion of administrative remedies." *Id.* (citing *Hodel,* 452 U.S. 264 (1981)); *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985)). Before such determination, the parties cannot be certain that the ICC will postpone an abandonment or increase the usage upon the railroad right-of-way. Of course, once suit has been brought, a taking may be held to have occurred during the ensuing period of time during which the owner is unable to use his or her property prior to determination. *See* e.g., *First English Evan. Luth. Church v. Los Angeles Cty.,* 482 U.S. 304, 322 n.10 (1987). (citing *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 5 (1984)).

The ICC issued its decision authorizing abandonment of MSRR's use of the right-of-way on February 25, 1988, and providing for a 180-day period within which to permit for the transfer and sale of the right-of-way to an appropriate entity. The administrative approval of Montgomery County's purchase then occurred December 14, 1988, when the ICC issued a Certificate of Interim Trails Use "CITU", permitting Montgomery County's proposed uses of the right-of-way pursuant to 16 U.S.C. § 1247(d). CCLC filed this action on

April 8, 1992. Therefore it filed this action within the applicable six-year limitations period.

The Club's complaint, filed on January 22, 1993, is also timely. The actual taking alleged by the Club is somewhat different from that alleged by CCLC. The Club objects to an excess use of the right-of-way by Montgomery County. It asserts that implementation of the proposed plan will interfere with its ability to utilize its golf course -- portions of which are located within, and the majority of which is located adjacent to -- the right-of-way. As such, the Club's alleged taking claim did not accrue until Montgomery County purchased the right-of-way in 1988.[17]

B. Taking Claim of Chevy Chase Land Company

1. Property Interest

In order to decide whether a taking has occurred, initially it must be determined whether CCLC has a compensable interest in the property at issue. This Court has jurisdiction to determine title to real property as a preliminary matter when addressing a taking claim. *See e.g. Yaist v. United States,* 656 F.2d 616 (Ct. Cl. 1981) (citing *Bourgeois v. United States,* 545 F.2d 727, 729 n.1 (Ct. Cl. 1976). CCLC therefore, must, at the outset, provide sufficient proof that it retains the underlying fee simple absolute title to the right-of-way, and did not convey it to MSRR by the 1911 deed. *See Preseault,* 100 F.3d at 1532-37. The issue presented is whether CCLC conveyed a fee simple or an easement by the 1911 deed.

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[17] Further, whether Montgomery County merely has an easement -- or if Montgomery County bought a fee simple -- does not matter with regard to the Club's claims, because the Club asserts that its property interests within the right-of-way as well as its adjacent property will be affected by this purchase and accompanying intended use in either case.

a. Description of Asserted Interests

Prior to turning to the 1911 deed, it is necessary to define the terminology involving estates in land which the parties utilize to discuss the conveyance here at issue. The concept of estates involves the legally permissible interests in land as measured by a time element. *State Roads Commission v. Johnson,* 222 Md. 493, 497-98, 161 A.2d 444, 447 (1960) (citing Gavit's Notes on Blackstone's Commentaries, at 281). Possessory estates may be held for a variety of different durations. A fee simple absolute (often inaccurately described as "fee simple") is of infinite duration, and comprises the greatest estate that one can possess. Roger A. Cunningham et al., *The Law of Property*, § 2.2, at 29 (2d ed. 1993) (hereinafter "Cunningham § __ at __"). *See generally, Johnson,* 161 A.2d at 447 ("'absolute estate in perpetuity' is synonymous with 'fee simple absolute'"). Other possessory estates are limited in duration, such as the defeasible fee simple (abbreviated by the occurrence of a specified event), the fee simple determinable (lasting only "so long as" a designated state of affairs continues), and so on.[18]

Easements, as opposed to possessory estates in land, do not impart a right of possession and full use, but rather, a specifically defined right to use land which is owned and possessed by another. Cunningham, § 8.1, at 437. When a mere easement is conferred, another individual property owner retains the underlying fee simple interest. At the point the easement uses lapse, a full, unburdened interest in the parcel will again be possessed by the individual owning fee simple tide. Often, instead of calling a property owner's

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[18] For a complete discussion of the various types of possessory and non-possessory estates, *see* Cunningham, §§ 2.1–2.10, at 26-62; *see also Bd. of Cty. Supervisors of Prince William Cty, Virginia,* 48 F.3d 520, 526 (Fed. Cir. 1995).

retained interest a "fee simple burdened by an easement," some commentators, and indeed, at times the parties in this case, have labelled the retained interest following the creation of an easement as a "reversion" in fee. This is because upon termination of the easement, the full estate "reverts" to the owner.[19]

Easements are generally created and transferred by the same kinds of instruments as possessory estates in land and usually pass under the same statutes of inheritance. Cunningham, § 8.1, at 437. While owners of possessory estates enjoy exclusive occupation, meaning the possessor may wholly exclude all others from all parts of the land without having to show that the other individual will actually interfere with any aspect of use and enjoyment, with an easement the right to exclude others extends only so far as to prevent their interference with the servitude's particular purpose. *Id.* As an easement confers only limited uses of a parcel of land, the owner of the underlying fee may make all uses of the land that do not unreasonably interfere with the easement. *Id.*, § 8.9, at 460.

Another distinction between the two interests lies in their alienability. Fee simple absolute estates in land are freely alienable. Generally, easements are not, with the exception of commercial easements -- ones held for business uses or that have independent economic value. *Id.*, § 8.10, at 461 n. 3, 4. Therefore, while fee simple absolute owners may grant at their discretion easements or licenses to others to use their land, to the extent that commercial easement holders can grant or divide their easements among additional parties,

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[19] Labelling the underlying fee owner's retained interest as a reversion is not consistent with the traditional estate classification scheme, which views the retained interest as a present estate in fee simple, subject to the burden of the easement. *Preseault,* 100 F.3d at 1533.

they may only convey easements to others for uses covered by their easement.

b. Construction of 1911 Deed between CCLC and MSRR

All parties have stipulated that prior to the conveyance embodied in the 1911 deed, CCLC owned legal title to the land at issue in this case. Although all parties submit to the authenticity of the 1911 deed, the parties dispute its legal meaning. Plaintiffs say that it conveyed an easement to the right-of-way at issue for railroad purposes. They assert that the parties' shared intent is illustrated by language in the 1891 Agreement as well as the railroad's charter. Plaintiffs maintain that the right-of-way was owned by CCLC throughout this century as a present estate in fee simple absolute, subject to the burden of an easement held by MSRR. Defendants assert that the deed simply conveyed the right-of-way in fee simple absolute.

The nature of the interest conveyed is determined according to the law of the state where the conveyance occurred. "[S]tate law creates and defines the scope of the reversionary or other real property interests affected by the ICC's action pursuant to Section 208 of the National Trails System Act Amendments of 1983, 16 U.S.C. § 1247(d)." *Preseault v. I.C.C.*, 494 U.S. at 20 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

Maryland law requires that a court look to the 1911 deed language to determine the nature of the interest conveyed. *See Levin v. Cook*, 186 Md. 535, 538-39, 47 A.2d 505, 507 (1946) (citations omitted). Under Maryland law the acceptance of a deed gives rise to a presumption that it is an execution of the whole contract of conveyance of real property. *Id.* All other prior agreements become null and void, except where the agreement contains covenants

collateral to the deed or where the deed appears to be only a partial execution of the contract. *Id.*; *Preseault,* 100 F.3d 1525 (other documents such as railroad charters considered collaterally).

In construing the import of a deed, a court must endeavor to deduce the intentions of the parties by considering the deed instrument as a whole, viewing the language used in light of the facts and circumstances of the transaction at issue as well as the governing law at the time of conveyance. *Watson v. Raley,* 250 Md. 266, 268-69, 242 A.2d 488, 488-90 (1968); *Green v. Eldridge,* 230 Md. 441, 447-48, 187 A.2d 674, 677 (1963); *Brown v. Whitefield,* 225 Md. 220, 169 A.2d 920 (1961); *Whittington v. Mann,* 211 Md. 199, 126 A.2d 617 (1956). The entire deed is to be given effect and the parties' intent must prevail. *Bright v. Lake Linganore,* 104 Md. App. 394, 416, 656 A.2d 377, 389 (1995), *citing Guilford Ass'n, Inc. v. Beasley,* 29 Md. App. 694, 700, 350 A.2d 169, 172-73 (1976) (courts must consider the circumstances surrounding the parties at the time a covenant is made). Parol evidence may be considered of collateral and independent facts which tend to support a deed, provided it is not offered for the purpose of varying the agreement. *Fedder v. Component Structures Corporation,* 23 Md. App. 375, 380, 329 A.2d 56, 60 (1974); *Levin,* 47 A.2d at 507.

If, after considering the surrounding circumstances and applicable principles of construction, the legal import of the deed is apparent, the Court may conclude its analysis at that point, and render a decision as to the nature of the interest granted upon a motion for summary judgment or similar summary proceeding. *See Eldridge,* 187 A.2d at 677 (case decided on dismissal of bill of complaint, deed language required construction as easement, and circumstances

surrounding conveyance were considered to be in accord with such reading).[20]

However, if the deed is ambiguous, or susceptible of two reasonable meanings, then the shared intent of the parties to the conveyance becomes a genuine issue of material fact limiting the grant of summary judgment. In determining whether a deed is ambiguous, the court need not necessarily look for a particular word or phrase which may be susceptible of two meanings, but must look to the document as a whole. *See Midkiff v. Castle and Cooke, Inc.* 45 Haw. 409, 415-16, 368 P.2d 887, 891 (1962); *Ward Co. v. Stamford Ridgeway Assocs.*, 761 F.2d 117, 120 (2d Cir. 1985) (ambiguity only exists if instrument is susceptible of at least two fairly reasonable meanings).[21]

The general thrust in construction of a deed involving a right-of-way has been that the clearer and fuller use indicated as granted, the more likely that the intended grant was a fee simple absolute; the more limited the use, the more likely that an easement was conveyed. John O. Dyrud, *Railroad Rights of Way -- Types of Interests Acquired*, 22 Maryland L. Rev., 57, 61 n.16 (citing 2 American Law of Property § 8.21 (1952)) (hereinafter "Dyrud, 22 Md. L. Rev., at __"). In construing whether a fee simple absolute or an easement has been conveyed by deed, Maryland courts have considered

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[20] See *Johnson v. Valdosta*, 169 Ga. 559, 150 S.E. 845 (1929) (in an action to recover title, demurrer sustained by appellate court when lower court had considered attendant circumstances and principles of law and had come to conclusion that fee simple absolute had been conveyed to railroad).

[21] Circumstances surrounding the making of the deed and any relevant usage of trade, course of dealing and course of performance comprise the sort of parol evidence a court may consider to determine the intent of the makers of the instrument. *Amoco Prod. Co. v. Western Slope Gas Co.*, 754 F.2d 303, 308 (10th Cir. 1985).

some or all of the following factors: (1) the specificity of the language of the deed describing the parcel being conveyed and any limitations on use of the subject parcel, (2) the extent of the privilege of usage granted, (3) the extent of the consideration offered, (4) whether the party claiming title needed to retain a possessory estate, (5) the type of deed by which the parcel was conveyed, (6) the duration of the interest conveyed, (7) as well as all relevant surrounding circumstances at the time of conveyance, such as which party was to be assessed and pay taxes on the parcel. *See generally, DC Transit v. State Rds. Comm'n,* 259 Md. 675, 270 A.2d 793 (1970), appeal after remand, 265 Md. 622, 290 A.2d 807 (1972) ("DC Transit II"); *E. Washington Ry. Co. v. Brooke,* 244 Md. 287, 223 A.2d 599 (1966); *Eldridge,* 187 A.2d at 677-78.

These factors are applied in conjunction with the applicable rules of construction set forth in the governing law. In 1911, at the time of conveyance here at issue, Maryland law included the following provisions:

> No words of inheritance shall be necessary to create an estate in fee simple, but every conveyance of real-estate shall be construed to pass a fee simple estate, unless a contrary intention shall appear by express terms or be necessarily implied therein.

Md. Code, Conveyancing, Art. 24 §§ 11 (1911). Although "fee simple" language designates intended duration, Maryland courts have generally interpreted this statutory language to be referring to the fee simple absolute estate as compared to more limited interests. *See e.g. Richfield Oil Co. v. Chesapeake & C.B.R. Co,* 179 Md. 560, 571-72, 20 A.2d 581, 587 (1941).

> The word "grant," the phrase "bargain and sell," in a deed, or any other words purporting to transfer the whole

> estate of the grantor shall be construed to pass to the grantee the whole interest and estate of the grantor in the lands therein mentioned, unless there be limitations or reservations showing, by implication or otherwise, a different intention.

Md. Code, Conveyancing, Art. 24 §§ 12 (1911).

Additional principles of construction extant in Maryland law at the time of the conveyance provided that restrictions were not be implied, and all doubts or ambiguities were to be resolved in favor of allowing the free use of the property. *Maryland Trust Co. v. Tulip Realty Co.*, 220 Md. 399, 409-10, 153 A.2d 275, 282 (1959); *accord Bd. of Cty. Supervisors of Prince William Cty., Virginia v. United States*, 48 F.3d 520, 526 (Fed. Cir. 1995) (citing Richard R. Powell and Patrick J. Rohan, 5B Powell On Real Property, §§ 839-40 (1994) (restraints on alienation of property are generally disfavored). Further, Maryland courts have time and again applied the rule that contracts will be construed against the grantor. *See Hodges v. Owings,* 178 Md. 300, 303-04, 13 A.2d 338, 339-40 (1940); *See also Yorkway Apartments, Inc. v. Dundalk Co.*, 180 Md. 647, 650, 26 A.2d 398 at 398-99 (1942). Additionally, Maryland law provided that railroads had the right to acquire fee simple absolute interests as well as easements. *See* 1870 Md. Laws ch. 476 § 10 (authorization to condemn land); 1852 Md. Laws ch. 326 § 14 (authorization for B&O to condemn land); *also see* 1904 Md. Laws art. 23, 259 (may acquire lands by purchase or gift).

With this in mind, the relevant language in the deed must be examined:

> . . . the said party of the first part (CCLC), for and in consideration of the sum of FOUR THOUSAND (4,000) DOLLARS, to it paid by the said party of the second part

> (MSRR), does **hereby grant and convey unto the said party of the second part, its successors and assigns, a free and perpetual right of way, one hundred (100) feet wide, over the land and premises hereinafter designated as "Parcel A"** and does hereby grant and convey unto the said party of the second part, its successors and assigns, in fee-simple, the land and premises, hereinafter designated as "Parcel B". . . .

1911 Deed (emphasis added).

It describes the right-of-way, or Parcel A, by metes and bounds, and summarizes it as a

> . . . ALL that piece or parcel of land described by metes and bounds . . . parcel being a strip of land fifty (50) feet wide on each side of the center line of the Metropolitan Southern Railroad through the land of the Chevy Chase Land Company. . . .

The deed's warranty clause states,

> AND the said party hereto of the first part hereby covenants to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite.

It further points out that the conveyance is

> SUBJECT to existing right of way for highway and other purposes over what is known as Connecticut Avenue Extended.

Legally significant aspects of the deed language can be categorized into the following groups: (1) the degree of limitations upon the conveyance; (2) usage of the term "fee simple;" (3) additional language of the deed; (4) the consideration contemplated; and (5) the additional surrounding circumstances.

1. Limitations Upon the Conveyance

Under Maryland law at the time of the conveyance, the word "grant" was held to pass the whole estate of the grantor unless the deed contained "limitations or reservations" indicating otherwise. Md. Code, Conveyancing, Art. 21 §§ 11-12 (1911). In cases involving the construction of a deed referencing a right-of-way, Maryland courts have found that if a corridor has been designated for railway purposes, that such limitation evidences intent to convey merely an easement, and not a fee simple absolute interest. *See e.g. Richfield Oil,* 20 A.2d at 584; *but see* 4 H Tiffany, The Law of Property § 980.1 (3d. ed. 1939) (a purpose clause, of and by itself, does not operate to limit the estate granted by the deed; it does not convert an otherwise absolute granting and habendum clause into an easement or other limited estate, unless there is other language clearly manifesting such an intention).

However, as stated earlier, the legal significance of the conveyance of a "right-of-way" has differed based upon the presence or absence of limitations in deeds conveying these parcels. The fuller the use of the property transferred the stronger is a case that a fee simple has been transferred, and courts have considered unqualified use of the term right-of-way to denote a possessory estate. Cunningham, § 8.3, at 443. The absence of limitations has influenced courts to find that a fee simple absolute had been conveyed. *See e.g. Sowers v. Illinois Cent. Gulf R. Co.,* 152 Ill. App. 3d 163, 172-73, 503 N.E.2d 1082, 1088-89 (1987). Baldwin's treatise on railroad law, which was published in 1904, seven years prior to the conveyance at issue, explained that to construct a deed granting an easement, a party must state in the granting clause of a deed "a right of way for railroad purposes over and upon." Simeon E. Baldwin, *American Railroad Law*, IV at 609-10 (1904).

The deed language here at issue contains no limitations upon MSRR's use of the right-of-way. In 1911 prior to the conveyance, CCLC owned the right-of-way parcel as an estate in fee simple, and the granting clause of the deed provided that CCLC was to "grant and convey" the land as a "right-of-way." The only limitation on CCLC's grant to MSRR involved what amounted to a reservation by CCLC of a "right of way for highway purposes" on Connecticut Avenue which would cross over MSRR's right-of-way. This phrase recognized a usage limitation upon Connecticut Avenue for an existing easement. That CCLC designated that this other right-of-way was "for highway purposes" would suggest that CCLC understood that limiting language was necessary for the creation of an easement. Yet, with respect to MSRR's right-of-way, no limitation was stated. These facts point to an intent to convey the right-of-way in fee simple absolute.

CCLC stresses that all Maryland courts have found conveyances of rights-of-way to have involved easements and not fee simple absolute estates. *See e.g.* 1.44 *Acres of Land,* 304 F. Supp. 1063, 1070; *D.C. Transit I,* 270 A.2d at 795; *East Washington,* 223 A.2d at 603. Plaintiffs interpret this fact as meaning that any grant of a right-of-way in the state of Maryland would involve an easement. Although the circumstances in the cases previously addressed by Maryland courts were determined to have militated in favor of easements, in fact, Maryland courts have acknowledged that the conveyance of a right-of-way may involve a fee simple absolute estate or an easement. *Maryland & Pa. R.R. v. Mercantile-Safe Deposit and Trust Co.*, 224 Md. 34, 37 n.1, 166 A.2d 247, 248 (1960), *cited in Read v. Montgomery County, MD,* 101 Md. App. 62, 69, 643 A.2d 476, 479 (1994). The Maryland Court of Appeals stated, "in one sense it is 'the strip of land upon which the track is laid'; in the

other sense it is 'the legal right to use such strip.'" *Id.* In legal terms a "right-of-way" denotes an easement, but in railroad parlance and lay speech it indicates a possessory estate of the strip of land upon which the track is laid. John O. Dyrud, Railroad Rights of Way -- Types of Interests Acquired, *supra*, at 62 n.21; *See also D.C. Transit I,* 270 A.2d at 799; *Maryland & Penn. R.R. Co. v. Mercantile-Safe,* 166 A.2d at 248 n.1; *United States v. 1.44 Acres of Land,* 304 F. Supp. 1063, 1071 (Md. 1969); *Joy v. City of St. Louis,* 138 U.S. 1, 44 (1890).

The majority of Maryland right-of-way cases have involved deeds containing language denoting that the grant was for a specified use, such as for "railroad purposes" or a railroad company's "chartered purposes," or other similar purpose restrictions in the granting or habendum clauses. *See 1.44 Acres of Land,* 304 F. Supp. at 1070 ("right of way for its chartered purposes" in deed indicated easement); *D.C. Transit I,* 259 Md. 675, 270 A.2d 793, 795 (1970) (habendum clause specifies tract indicated was for a right-of-way and such other purposes as said Railway Company is authorized under its act of incorporation); *East Washington,* 223 A.2d at 603 ("right of way . . . being a strip of land . . . for railroad purposes"); *Richfield,* 20 A.2d at 584 ("rights of way for railroad purposes"). In these cases, Maryland courts have found the phrase "for railroad [or other specific] purposes" -- whether in the granting or habendum clauses of the deed -- to be language conditioning the grantee's use of the land. As such, they determined that only a right or privilege to use the land, an easement, had been intended to be conveyed.

Other Maryland cases have involved deeds which did not specifically include limiting language such as "for [specified] purposes" within the granting clause, as was used in *1.44 Acres, D.C. Transit, E. Washington* and *Richfield*, yet it was

determined that the language of the deeds as a whole indicated that the grant was confined to a privilege or right conditioned upon certain circumstances. *See Eldridge,* 187 A.2d at 675; *Hodges,* 13 A.2d at 339-40. For example, in *Hodges*, the deed conveyed ". . . a strip of land . . . width as may be required in the construction and use of said Railroad . . . together with the right to divert streams of water for Railroad purposes, and to take and use any stone or timber or other material within the limits of said strip of land. . . ." *Hodges,* 13 A.2d at 338-39. In construing this language to convey only an easement, the court held that if there had been an intention to convey the underlying fee, the right to use the stone, timber and other materials on the land would have come automatically, without leave or permission from the grantor or anyone else. *Id.* at 340.

In *Eldridge*, the deed's granting clause conveyed "the uninterrupted use, liberty and privilege of, and passageway in and along a certain right of way. . . ." *Eldridge*, 187 A.2d at 675. In construing the import of the deed, the court held that this language as a whole evidenced the conveyance of a privilege to use land -- an easement -- and not an estate in land. *Id.* at 677-78.

The instant case is easily distinguished from the scenarios presented previously in Maryland courts, because there is no conditional language limiting the uses of the right-of-way parcel; rather, the deed provides for a "free and perpetual right of way" -- thus indicating full, unrestricted use. Again, the only limitation on the use of the right-of-way parcel was that it was subject to "an existing right of way for highway and other purposes over what is known as Connecticut Avenue" -- a pre-existing easement. This was merely a provision marking a public highway right-of-way. It did not limit the scope of uses of the railroad's right-of-way. Further, it did not prevent the other parcel, the one

previously allotted for the depot, from being conveyed as an estate in fee simple absolute.

Thus, due to the outright grant of the right-of-way and the absence of purpose limitations, consideration of the deed in conjunction with conveyancing law of the time lends strength to a construction of the transaction as contemplating a fee simple estate. Several additional elements serve to reinforce the construction of the term "right-of-way" as describing an estate in fee simple absolute. These factors include (1) the prior existence of the right-of-way; (2) the warranty clause in the deed; and (3) the fact that other deeds of the time period from CCLC to various railroads and entities contained limiting language.

First, the fact that the right-of-way had already been built may indicate that the parties had intended the conveyance of a parcel in fee simple absolute, and not an easement. *See Sowers*, 503 N.E.2d 1082. Once the tracks have already been laid, the term right-of-way in a the deed may be construed to likely have referenced a physical entity and the land supporting it -- as opposed to a mere right or privilege of passage, as the term "right-of-way" when used in the abstract, may be held to connote. *See e.g. Eldridge*, 187 A.2d at 674; *East Washington,* 223 A.2d at 603. As in *Sowers*, use of the term right-of-way was, necessarily, a reference to the identity of the location of the land conveyed as that land which had already been occupied by the grantee railroad company as its roadbed. 503 N.E. at 1088-89. This reference served to locate the strip of land conveyed -- and designate its specific metes and bounds.

Maryland right-of-way cases have generally involved deeds referring to rights-of-way which were projected to be built in the future -- not rights-of-way which were already built at the time of conveyance. *See 1.44 Acres*, 304 F. Supp. 1063; *Eldridge,* 187 A.2d 674; *Hodges*, 13 A.2d 338 (deed

granted land "as may be required" indicating construction of railroad to occur in future); *cf. Richfield,* 20 A.2d at 585. *Richfield* is the only Maryland case involving the conveyance of a right-of-way with tracks already laid upon it. However, the facts of *Richfield* are distinguishable from the instant case and *Sowers*. In *Richfield* usage limitations were set forth in the deed. Further, the grantor was the parent corporation of the grantee. As such, the court reasoned that the grantor would not have intended to grant a fee because doing so might result in its loss of the ability to cross from one part of its land to another should the grantee come under new ownership at some point in the future. *Richfield*, 20 A.2d at 587. Therefore, in the instant case, Maryland courts would likely determine that existence of the tracks prior to the conveyance would explain the usage of the term right-of-way and that, consequently, the term was descriptive of the actual land and tracks, and not of a prescribed use of the parcel, as would be indicative of an easement.

Secondly, and further illustrative of an intent to convey a fee simple in this case, is the deed's warranty clause. The clause provides that CCLC ". . . covenants to warrant specially the **property** hereby conveyed, and to execute such further assurances of said **land** as may be requisite." (emphasis added). By referring to land, and not distinguishing between parcel A (the right-of-way) and parcel B, this clause demonstrates that the intent was to convey land or real property -- and not a mere right to use the described parcels.

Further, the fact that there were no limitations on the use of the right-of-way is even more telling in light of the surrounding circumstances. *See Fedder*, 329 A.2d at 60; *Levin,* 47 A.2d at 507 (parol evidence may be considered of collateral and independent facts which tend to support a deed, provided it is not offered for the purpose of varying the

agreement). During this very time period, CCLC executed several deeds which contained precise usage limitations in order to convey interests lesser than fee simple estates, illustrating that CCLC was aware at the time it executed the 1911 deed that words of purpose limitation were necessary to create an easement.

Around the same time, on November 8, 1894, CCLC deeded to the Chevy Chase and Kensington Electric Railway Company

> ". . . a right of way over . . . A strip of land 25 feet wide . . . **subject to the following provisos, limitations and conditions. The said [railroad company] shall construct and complete and commence regularly operating within nine months hereafter an electric railway.** . . . [I]f the said [railroad company] . . . shall thereafter fail to continuously operate said railway as an electric railway the interest of the said [railroad company] in the right of way hereby conveyed shall at once cease and determine and the same shall therefrom revert to [the Land Company]. . . ."

FDA 5-7 (emphasis added). Here, the Club clearly spelled out limitations upon the grantee's usage of its right-of-way.

Again, on April 14, 1896, CCLC executed a deed with the Glen Echo Railroad Company of Montgomery County, Maryland, similarly containing specific limiting conditions, contemplating ". . . a right of way for the purpose of constructing and operating the railroad. . . ." It further provided, "the said right of way shall only be used and occupied by the said railroad company as a right of way for an Electric railroad, and for no other purpose or service whatsoever. . . ." This limiting language indicated an intent to convey an easement.

During the late nineteenth and early twentieth centuries, CCLC executed numerous other deeds for highways, parks and parkways as well as for land to a schoolhouse. In each it described contingencies upon which the easement would lapse and the land would revert to CCLC in fee simple absolute.

The 1911 deed does not even refer to the word "railroad," let alone restrict the use of the land to railroad purposes. Nor does it contemplate a reversion or lapsing of the right-of-way. Based upon CCLC's failure to include any restrictive or reversionary language, the warranty clause contained within the deed which warrants both parcels in the same manner, as well as CCLC's contemporaneous deeds containing clear limiting language, the 1911 deed must be construed to reflect an intent to grant a fee simple absolute, and not an easement.

2. Use of Term "Fee Simple"

Plaintiffs maintain that the granting clause of the deed evidences a distinction in the nature of the interests granted in the two parcels, because while both are referred to as parcels "of land," parcel A, the right-of-way, is merely described as "free and perpetual," whereas parcel B is described as being conveyed in "fee simple." In so arguing, Plaintiffs assume that the term "fee simple" as contained in the 1911 deed, designates an estate in fee simple absolute, whereas usage of the terms "free and perpetual" merely defines the contemplated extent and duration of the use of the right-of-way granted by CCLC.

In actuality, usage of the terms "perpetual" and "fee simple" in the granting clause of the deed further illustrates that the same interest was to be conveyed in the two parcels involved in this case. Although the words "fee simple" often have been misinterpreted as designating the nature of a property interest as being an estate, the term actually defines

duration. The term "fee simple" specifically relates to the time element or the duration of the interest, and indicates that the holder of an interest in land retains such right in perpetuity -- for infinity. Cunningham, § 11.1, at 766 n.53. Both easements and possessory estates in land may be conveyed in fee simple and thus be of perpetual duration. *Id.*; *See Eldridge*, 187 A.2d at 677. Easements -- unless otherwise indicated -- are generally held in fee simple, See Md. Real Property Code § 4-105 - "every grant or reservation Of an easement passes or reserves an easement in perpetuity."[22] In the instant case, there is no reason to believe that the term was misused by the parties to distinguish the interest conveyed in the depot -- as a possessory estate -- from the interest conveyed in the right-of-way.

Further, the parties' prior history illustrates that before the execution of the 1911 deed, there had been no distinction in the way that the parties had intended to convey the parcels. Indeed, the parcels were referenced identically in the 1891 Agreement and the 1910 letter from a CCLC official.

The unrecorded 1891 Agreement appears to intend the conveyance of an easement, as it indicates that the land

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[22] Often courts have drawn a misplaced distinction between fee simple and easement property interests. *See e.g. DC Transit I,* 259 Md. 675, 270 A.2d 793; *Johnson,* 161 A.2d at 447. The term "fee simple" has been used as an abbreviation for the term fee simple absolute throughout the years -- adding immeasurably to the confusion veiling this entire body of law. *See e.g. Johnson,* 161 A.2d at 447 (1960). Mistakenly equating the words "fee simple" with an estate as opposed to duration, courts have even found "conflicts" in deeds conveying interests which they determined to be easements when the deeds contained language to the effect that the parcel was deeded in fee simple. *See Eldridge,* 187 A.2d at 678 (despite fee simple language, the court found easement had been transferred).

discussed was to be used in conjunction with MSRR's contemplated railroad. It provided,

> The Metropolitan Southern Railroad Company contemplating the construction of a line of road in connection with its Metropolitan Branch, to be known as the Metropolitan Southern Railroad, to traverse certain lands, the property of the Chevy Chase Land Company, . . . [CCLC would] **donate and convey to the said railroad company a right of way** . . . [metes and bounds description] . . . and . . . **donate and convey to the said Railroad Company for the purposes of a passenger and freight depot, and uses incident thereto, including side tracking, the following described parcel of land** (Parcel B). . . .

1891 Agreement (emphasis added). This language contains no distinction in its references to the depot parcel and the right-of-way. Based upon its implicit (railroad usage[23]) and explicit usage limitations (freight depot) on the parcels, it is fairly clear that it contemplated the conveyance of an easement.

Then, after nearly two decades had passed, and subsequent to the completion of the railroad, in 1910 the letter from a CCLC official to one J.D. McCubbin made reference to a new instrument of conveyance which the parties had negotiated. It provided, "I have had a long talk with Senator Newlands, President of the Chevy Chase Land Company, and have succeeded in getting his consent to the arrangement suggested by you sometime during the past summer." The official continued, "the arrangement was that the Baltimore and Ohio Railroad pay to the Chevy Chase

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[23] Further below in the 1891 Agreement, the parties also contemplated the construction of the railroad tracks upon the rights-of-way as part of the bargain. *See* MC-3.

Land Company Four Thousand Dollars in cash, and **in consideration of this payment, have conveyed to it, all the property covered by its right of way contract** with the Land Company, entered into some years ago. . . ." (emphasis added). The letter indicates that the 1891 agreement had been superseded and a new agreement involving conveyance of estates in the land covered by the 1891 agreement was made.

Therefore, as the term "fee simple" apparently indicated the duration and not the nature or extent of the estate being conveyed, the usage of the words fee simple in describing parcel B -- the depot parcel -- does not give rise to any negative implication as to the nature of the interest conveyed in parcel A.

3. Additional Deed Language

Plaintiff further asserts that usage of prepositions such as "over" and "through," denoting the location of the right-of-way within the deed illustrates that CCLC owned the underlying fee estate and that MSRR only received a right to use the land. The 1911 deed discusses a ". . . right of way, one hundred (100) feet wide, **over** the land and premises hereinafter designated as "Parcel A". . . . **through** the land of the Chevy Chase Land Company. . . ." (emphasis added). Plaintiffs assert that Maryland courts have construed deeds with such language as conveying easements. Examples of such cases include, *1.44 Acres*, 304 F. Supp. at 1070, *E. Washington*, 223 A.2d 599, and *Richfield,* 20 A.2d 581.

These cases involved significant indications of an intent to grant an easement in the form of limitations on usage of the land within the deeds -- and plainly did not turn on the usage of such prepositional phrases. *See id.* Cases which involved deeds lacking use limitations and where similar common law and conveyancing statutes to Maryland's were in place, such as *Midland Valley Railroad Co. v. Arrow*

Industrial Manufacturing Co., 297 P.2d 410, (Okl. 1956) and *Valdosta,* 150 S.E. 845, rather, more effectively demonstrate the proper construction of the instant deed. In these cases, the "over" and "across" language referencing the exact parcel of land over which the right-of-way existed did not deter courts from construing deeds as conveying fee simple absolute estates. *See id.*

For example, in *Midland*, a strip of land had been conveyed to a railroad as a "strip of land for a right of way over and across the following described tract of land." *Midland,* 297 P.2d at 411. The land described was the actual strip which was at issue in the conveyance, and yet the court was not persuaded that the interest conveyed was an easement. *Midland,* 297 P.2d at 411. In *Valdosta*, "A strip of land sixty feet wide for a railroad right of way over, upon, and across about twenty-five acres," the precise acreage of the easement, was conveyed, and yet the court was not deterred from finding that a fee simple had been intended. *Valdosta,* 150 S.E. at 847-48.

Further, even in *Sowers*, where the right-of-way referenced in the deed was described as running across a larger plot -- which at first blush might seem to indicate that the right-of-way was merely a right to use that portion of another's land, a possessory estate was held to have been conveyed. *Sowers,* 503 N.E.2d at 1089. However, the fact that the tracks were built along with the syntax of the deed language, convinced the *Sower's* court that the words "over and above" merely "served to locate the strip of land conveyed out of a larger tract. *Id.* Such language was "consistent with the description of the right of way," as the tracks and roadbed had already been laid upon the parcel of land at issue in the deed. *Id.*

Thus, usage of the terms "through" and "across" someone else's adjacent land by the involved parties does not

necessarily indicate that the grantee was not being conveyed an estate in the tract in question.

Of notable significance is that the 1909 license agreement between MSRR and the Columbia Country Club provided, "whereas, the said Metropolitan Southern Railroad Company owns and maintains a right-of-way, road-bed and track running **through and across the said land of the said Columbia Country Club.**" (emphasis added). If this court were to apply Plaintiff's own reasoning, the words through and across would indicate that the Club owned the underlying fee and that the MSRR owned tracks running across this fee. It is quite clear, however, that in this instance the Club did not acquire by conveyance the fee underlying the MSRR tracks -- none of the parties have asserted this.

It is therefore apparent that at the time the 1911 deed was negotiated and drafted, it was common usage to utilize these prepositional phrases to locate a parcel. Therefore, it is more probable that these prepositional phrases were used for descriptive purposes and were not necessarily intended to dictate or circumscribe the interest conveyed in the land. Accordingly, this language is not determinative of the interest conveyed by the 1911 deed.

4. Consideration

Courts have considered the extent of consideration exchanged as a factor in this analysis, as well -- the greater the consideration exchanged, the more likely the court will construe a right-of-way deed as intending the conveyance of a fee simple absolute. *See e.g. Valdosta*, 150 S.E. at 847-48. The 1911 deed speaks of $4000 consideration in return for a 12-acre right-of-way and a .9 acre depot lot. CCLC points out that the deed states that the $4000 payment was actually for the cancellation of the depot construction obligation arising in the 1891 agreement, and further assert that this

amount was not substantial enough consideration for a conveyance of the right-of-way in fee simple absolute in 1911, in light of the higher jury awards for easements condemned between 1891-93. Thus, CCLC contends that it was only enough to compensate for the conveyance of an easement interest. Defendants, on the other hand, point to the December 20, 1910 letter by a CCLC official which indicates that the $4000 was to be paid in consideration of the conveyance of the "property covered by its right of way contract with the Land Company," [including the railroad corridor and the depot tract], as well as the waiver of the obligation to build a depot.

First, regarding CCLC's contention that the amount of consideration was insubstantial, the cases involving higher jury awards presented by CCLC are not probative with regard to the consideration inquiry in this case because they involved condemnation proceedings where parties' land was taken away against their wishes. As stated above, this case involves a bargained-for deed.

Additionally, four thousand dollars would appear to be more than nominal consideration for a 12-acre right-of-way and .9 acre lot conveyed in the 1911 deed. In *Valdosta*, 150 S.E. 845, a court found $400 to be substantial consideration for the conveyance of 25 acres in fee and factored this into its ultimate construction of a similar deed for a railroad right-of-way to be conveyed in fee simple. ($400 was substantial consideration for right-of-way, as distinguished from case where easement held conveyed for benefit of construction of railroad + $5.). *See Phillips*, 20 F. Supp. 498, 503 (W.D. Okl. 1937) ($650 consideration given, and no purpose limitation results in finding of fee simple); *Midkiff v. Castle & Cooke, Inc.*, 368 P.2d at 889 (1899 transfer of in excess of 23.8 acres for consideration of $3294 found to confer fee simple). In comparison, in the Maryland cases where the courts held that

easements had been transferred, the consideration was nominal. *See e.g. DC Transit I,* 270 A.2d 793 ($1.00 consideration); *Hodges,* 13 A.2d at 338 ($1 consideration).

Further, as evidenced by the 1891 Agreement and CCLC's many dealings with railroads, CCLC had wished for railroads and public highways to adjoin and serve its Chevy Chase landholding. In this regard, CCLC had secured half-rate discount fares from MSRR for shipment of freight. A-63. Based upon this analysis, the amount of consideration tendered does not militate in either direction -- that the deed contemplated either a fee simple absolute estate or an easement.

5. Additional Surrounding Circumstances

The parties' actions at the approximate time of the right-of-way conveyance provide additional insight into the intent behind the 1911 deed. The circumstances surrounding the purchase of land by Columbia Country Club from CCLC are perhaps most significant in deciphering the nature of the interest received by MSRR in the right-of-way.

First, the language of the license/crossing agreement between MSRR and the Club provided, "whereas, the said Metropolitan Southern Railroad Company owns and maintains a right-of-way, road-bed and track running through and across the said land of the said Columbia Country Club." This language illustrates that MSRR had believed at the time that it **owned and did not merely possess** the right-of-way, or would own it once there had been recordation of a deed.

Second, CCLC sold **two tracts of land** to the Club -- not one large plot -- in 1909. See CBA-29. The two tracts were separated by the MSRR right-of-way. Had MSRR acquired only an easement, CCLC could have conveyed the fee underlying the right-of-way to the Club, and reserved an easement over the property for MSRR, as it reserved an

easement for highway purposes over Connecticut Avenue in the 1911 deed to MSRR. When a right-of-way is an easement, the owner of the servient tenement retains title to the underlying land and is entitled to use the land in any manner which does not interfere with the easement holder's use. *See e.g. National Wildlife Federation v. ICC,* 850 F.2d 694, 703 (D.C. Cir. 1988); Cunningham, § 8.1, at 436-37. No evidence has been presented illustrating that this was even contemplated by the parties. Alternatively, CCLC could have held the fee interest in the right-of-way strip of land and granted the Club an easement over the strip. CCLC did not do this either. Conveyance of the two separate parcels is therefore indicative that CCLC had already contemplated the granting of title underlying the right-of-way to MSRR, as it seems improbable that CCLC would have split the some 129-acre plot otherwise.

Further weighing in favor of a fee simple absolute is that CCLC sent the Club to MSRR in 1909 -- before the execution of their agreement -- to obtain the right to cross over the MSRR right-of-way. CCLC indicated to the Club that it would need to obtain written permission from MSRR to cross the right-of-way prior to purchasing the two parcels. However, one who owns underlying fee title need not obtain permission from the party in possession of the easement so long as the proposed use will not interfere with the existing easement. *See Richfield,* 20 A.2d at 589 (owner of fee title may utilize land burdened by easement so long as such usage does not "interfere or interrupt the reasonable and proper use" of the easement holder's intended use of land). The owner of the fee underlying the strip may allow third parties to use the right-of-way in a manner which does not interfere with the right-of-way easement. *West, Public Service Comm'n v. Maryland Gas Transmiss'n Corp.,* 162 Md. 298, 312, 316, 159 A. 758, 765 (1932) (unnecessary to obtain

permission from State for underlying fee owner's commissioning of third party to project pipeline underneath right-of-way easement if such act would not "interfere in any way with . . . the public easement."). Crossings for the Club (such as the bridges that were erected) would not necessarily disturb the railroad. Assuming CCLC owned the underlying fee in this case, it could have arranged for Club use by simply requiring the railroad to cooperate. If the land company believed in 1911, as it now asserts, that it would continue to possess the underlying fee simple estate in the strip, it would only have made sense that it would have provided the crossing agreement to the Club. It would not have required an agreement from MSRR.

Additionally, all evidence presented points to the fact that the railroad paid property taxes along the strip, yet another incident illustrative of ownership. CCLC has stated that it neither was assessed not paid any property taxes on the right-of-way property.

6. Conclusion

The parties' subsequent and conflicting understandings of the deed notwithstanding, a consideration of the entire text of the deed, as well as the corresponding circumstances surrounding its execution, reveals that the parties intended the conveyance of an estate in fee simple absolute. The parties have thoroughly presented all available evidence together with excellent briefs and arguments. In light of this construction of the 1911 deed, with respect to the claims of Plaintiff, the Chevy Chase Land Company, summary judgment in favor of the Defendants, the United States and Montgomery County, must be granted.

2. ABANDONMENT

The parties' briefs also address the contingency that the deed would be construed to have conveyed an easement

instead of an estate in fee simple absolute. While it has been determined that the 1911 deed did not convey an easement, the contentions of the parties concerning the existence of a taking if an easement had been deeded in 1911 will be addressed.

Plaintiffs assert that MSRR abandoned the asserted easement, causing it to lapse and unencumbered title to lie with CCLC. Defendants continue to maintain that MSRR acquired the railroad property in fee simple absolute, but argue in the alternative that if this Court should find that only an easement were conveyed by the 1911 deed, that such easement has not been abandoned. Defendants also argue at length that Montgomery County, once having acquired the right-of-way pursuant to the Rails-to-Trails Act, also did not abandon it. In this regard, they have set forth Montgomery County's extensive plans to build a light rail and hiker/biker trail on the property. They further assert that Montgomery County's intended uses of the right-of-way are within the scope of that original easement.

Easements for public purposes acquired by quasi-public corporations such as railroads, either by purchase, condemnation or prescription, derive their very existence from the continued use of the property for such purposes. *See Canton Co. v. Baltimore & O. R. Co.,* 99 Md. 202, 218, 57 A. 637, 638-39 (1904), *cited in Mercantile-Safe Deposit & Trust Co.,* 166 A.2d at 250. When such public use is abandoned, the easement lapses, and the fee owner is left with unencumbered title to the property. *Id.* The burden of proving abandonment rests with the party who asserts or relies upon it. *Read,* 643 A.2d at 481, (citing *Mercantile-Safe Deposit & Trust Co.,* 166 A.2d at 250). Here, Plaintiff, CCLC relies upon the abandonment to establish its takings case.

CCLC sets forth several acts which it asserts are demonstrative of the railroad's intent to abandon, as a matter of law: (1) B&O's statement in 1983 that it would abandon railroad service in three years; (2) B&O's July, 1985 resolution to seek ICC approval to terminate rail service; (3) MSRR's refusal to fix the tracks when they fell into disrepair in 1985, and accompanying cesser of use from that point; and (4) the railroad's April 9, 1986 application to the ICC seeking its approval of the abandonment and discontinuance of service over the Georgetown Branch.

Defendants assert that the acts proffered by Plaintiffs are not illustrative of abandonment, as a matter or law, because (1) the railroad tracks and ties remain -- as had been a determinative factor in other cases where abandonment was found, *cf. D.C. Transit II,* 290 A.2d at 811-812; and that (2) the railroad's 1985 resolution did not indicate that railroad use would be altogether terminated, but rather, constituted the first step in the process of allowing another entity to assume responsibility for the line while retaining the option to abandon if the railroad later decided to do so; and (3) at the time of conveyance and recordation of the easement the abandonment could not occur under state law unless it had been approved by the Maryland Public Service Commission, the appropriate regulatory board. *See* 1910 Md Laws ch. 180, § 26 1/2, as added by 1914 Md. Laws ch. 445, § 1, *cited in Benson,* 118 A. 852-54 (1922).

Courts applying Maryland law in the context of easement abandonment have consistently held that abandonment is a question of intent. *See Read v. Montgomery County,* 643 A.2d 476, 481, 101 Md. App. 62, 72 (1994); *Peck v. Baltimore Cty,* 286 Md. 368, 410 A.2d 7, 9 (1979); *Canton,* 57 A. at 638-39; *Vogler v. Geiss,* 51 Md. 407, 410 (1879). In *Vogler,* an 1879 landmark case involving the abandonment of an easement, the court set forth a test to determine the

intent to abandon, which Maryland courts have used as a yardstick ever since. *Vogler,* 51 Md. at 410. The *Vogler* court instructed that to establish an intent to abandon, the party with the burden of proof must present evidence of "[A] cesser of the use, coupled with any act clearly indicative of an intention to abandon the right." *Id.* The court explained,

> [the] act or acts relied on . . . must be of a decisive character; and while a mere declaration of an intention to abandon will not alone be sufficient, the question whether the act of the party entitled to the easement amounts to an abandonment or not, depends upon the intention with which it was done, and that is a subject for the consideration of the jury.

Id. The Maryland Court of Appeals explained in *DC Transit II* that the action necessary to produce abandonment of an easement "must be action in respect of its use which indicates an intention never to make use of it again." *DC Transit II,* 290 A. 2d at 810 (citing 2 American Law of Property § 8.97 (A.J. Casner ed. 1952).

Whether circumstances are sufficient to establish an intent to abandon must be decided on a case-by-case basis. *D.C. Transit I,* 290 A.2d at 811. While there is not one specific type of act that will qualify as the requisite act for purposes of the *Vogler* test, Maryland courts have found that the tearing up of tracks (*DC Transit II,* 290 A.2d 807); failure to repair tracks or resume service and removal of track material accompanied by corporate resolution to abandon (*P.S.C. of Md.,* 89 A. 726); and the erection of permanent structures upon the tracks (*Vogler,* 51 Md. 407), had fulfilled this requirement.

As resolution of the abandonment inquiry requires a determination of intent, an issue of fact, it often cannot be made on summary judgment. *See e.g., Peck,* 410 A.2d at 9

(reversing grant of summary judgment on abandonment issue and remanding for retrial when street had been relocated from original easement as the intent of the parties was a material fact to be determined by factfinder). However, in the instant case, although the parties dispute the ultimate legal conclusion of whether an abandonment occurred, the material facts are agreed. Here, as in Preseault, the abandonment inquiry requires a factual conclusion based on inferences to be drawn from the undisputed evidence. As was pointed out in Preseault, "nothing would be gained by requiring a further proceeding at the trial level, since the parties had full opportunity to establish all relevant underlying facts. Trial would not enhance the court's ability to draw factual inferences and conclusions." *Preseault,* 100 F.3d at 1545-46; *see id.* at 1553-54 (Rader, J. and Lourie, J. concurring) (parties did not show the existence of any disputed material fact).[24] The facts of this case are clear and lead to the ultimate legal conclusion that abandonment of the line by the railroad did occur.

In this case, the *Vogler* test for abandonment has been satisfied. The intent of the railroad to never make use of this right-of-way again has been evidenced by certain undisputed acts, (1) the railroad's application to the ICC for abandonment, (2) the railroad's opting to decline to fix the tracks when they fell into disrepair, and (3) the railroad's making arrangements with the two remaining shippers on the line to transport their goods by truck, as evidenced in the railroad's application to the ICC.

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[24] *But see Peck,* 410 A.2d at 13 (*citing Fenwick Motor Co. v. Fenwick,* 258 Md. 134, 138, 265 A.2d 256, 258 (1970) ("[e]ven where the underlying facts are undisputed, if those facts are susceptible of more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to a trier of fact.").

Service on the MSRR line continued from 1911 through 1985, but had decreased markedly by the early 1980's. *See* A-112-125. In 1983 the railroad posted notices along the line indicating that it intended to abandon the line by applying to the ICC in this regard within three years. On May 10, 1985 service on the Georgetown Branch was fully terminated due to the immediate need for major repairs to the trestle over Rock Creek, as well as repairs to other positions of the line. Subsequently, in June 1985, B&O passed a corporate resolution to abandon or discontinue service upon the railroad corridor and seek ICC approval to do so.

CCLC maintains that the passage of this resolution was the decisive act evidencing abandonment as required in *Vogler*. However, a close inspection of the resolution's text reveals that, although the document evidences that the railroad contemplated abandonment, it was not a definitive act of abandonment, but merely demonstrated the steps which would be indicative of an abandonment in the future.

The 1985 resolution provided,

> RESOLVED, that this Company abandon or discontinue service over the following Georgetown Subdivision lines: . . .
>
> * * * * * * *
>
> (2) Discontinue service on that portion of the Georgetown Subdivision . . . owned by Metropolitan Southern Railroad Company, in Montgomery County, MD, a distance of approximately 7 miles; and
>
> * * * * * * *
>
> RESOLVED, that . . . **the execution of an application or notice of exemption to the Interstate Commerce Commission . . . or, if appropriate, the execution of a petition for exemption to said**

> **Commission by Company counsel, in respect of any such abandonments and discontinuances, shall be conclusive evidence of such determination.**

B&O Resolution of June 11, 1985, A-85 (emphasis added). As this language demonstrates, the railroad intended the filing of an ICC petition for abandonment or discontinuance to be "conclusive evidence" of such intent.

Minutes from an MSRR director's meeting of July 22, 1985 similarly show that MSRR ultimately sought to abandon the line. MSRR Director Minutes, July 22, 1985, A-87. They provide,

> RESOLVED, **that this company abandon**, and its (sic) **hereby consents to the Baltimore and Ohio Railroad Company's discontinuance of service on**, that segment of its line of railroad, being a portion of the Georgetown Subdivision. . . .
>
> * * * * * * *
>
> . . . and the execution of an application or notice of exemption to the Interstate Commerce Commission . . . in respect of any such abandonment, shall be **conclusive evidence of such determination**.

(emphasis added).

The separate references to the application for ICC approval to abandon and the actual abandonment determinations within both corporate resolutions show that the railroad bodies were cognizant of the distinction between an actual property law abandonment of the right-of-way (meaning an intent to not use it again) and the term "abandonment" meaning the federal, ICC-imposed regulatory hurdle. Reading of these resolutions in any other way would make them redundant and rob the statements that

execution of an application would be "conclusive evidence of such determination," of any meaning at all.

Again, although they do not constitute acts indicative of abandonment in and of themselves, the resolutions are relevant because they explain the steps necessary to illustrate a future abandonment. Within these resolutions the railroad stated that an application to the ICC would be evidence of an abandonment. *See* Restatement of Property § 504(c) (Verbal expressions of an intention to abandon are relevant for the purpose of giving meaning to acts which are susceptible of being interpreted as indicating an intention to give up the use authorized by an easement, but which do not of themselves conclusively demonstrate the intention behind them.)

When the railroad then proceeded to submit this application on April 9, 1986, on behalf of MSRR, B&O, and its affiliates, it therefore acted in a manner indicative of abandonment. A-88-111, April 9, 1986 Application to ICC, ICC Docket No. AB-19 (Sub-No. 112). Further, within the application, the railroad stated explicitly, "applicants have not considered any alternative to the proposed abandonment." *Id.* at 98. Supporting this contention were additional actions by the railroad including leaving the tracks in disrepair and then diverting the line's two remaining shippers' deliveries to be transported by truck. See A-115, ICC Decision of February 28, 1988. Therefore, evidence of abandonment has been provided.

Defendants, attempting to show that the above does not constitute an abandonment, argue that the railroad could have filed for ICC abandonment and still planned to utilize the corridor for spur, side tracking, or intrastate uses, all uses not governed by the ICC. *See* 49 U.S.C. § 10907 (no authority over spur, side track, switching). Defendants have not presented any evidence in support of such intent.

Defendants also assert that the railroad had discussed the possibility of transferring the line to Montgomery County, and therefore did not intend to abandon, citing *KCT Railway Corp. -- Abandonment Exemption -- Franklin, Anderson, and Allen Counties, KS,* Dkt. No. Ab-335 (Sub-No. 2X), 7 I.C.C. 2d 1035 (June 6, 1991) (ICC finds interest in negotiating trail use agreement inconsistent with intent to consummate abandonment). They point to minutes from a December 18, 1985 meeting in which CSX contemplated the sale of the property to Montgomery County:

> We will negotiate with Montgomery County for the transfer of the section of right-of-way between the District line and our main rail line north of Silver Spring for use as a transit-way or public bike path, in exchange for development rights of comparable value, either at selected air rights location along the right-of-way, or on other property to be traded for.

FDA-112. Defendants also point to the railroad's 1988 attempts to sell the line to Montgomery County as well as Laurel Sand and Gravel as illustrative of an intent to keep the right-of-way, inconsistent with an intent to abandon. However, efforts to sell the line subsequent to filing of the ICC application are not necessarily evidence of an intent to postpone abandonment. They equally likely could illustrate that the railroad realized that it would be subject to the rail-banking provisions.

The fact that CSX had contemplated the possible sale of the right-of-way would not preclude abandonment under Maryland property law. In *P.S.C. of Md.,* 89 A. 726, the Maryland Court of Appeals concluded that a railroad had abandoned its railroad in 1897 with its cesser of use and accompanying acts, despite the fact that the railroad continued to be sold and transferred numerous times thereafter. This reasoning retains current validity because the

termination of the uses for which an easement was granted may occur, and thus a state law abandonment, and yet a railroad may still intend to or actually sell the right-of-way during the period before the ICC grants the abandonment. Conversely, *KCT Railway*, contemplates the only the ICC-instituted abandonment, not state law property rights, and therefore the inferences drawn from negotiations for trail use are not relevant to the determination at hand.

Further, had the railroad sought to sell the property in 1986, and not to abandon, it could have done so under the appropriate statutes governing ICC practice. *See* 49 U.S.C. 11343 (transfer and purchase by other common carriers); 49 U.S.C. 10901 (common carrier status).[25] Or, it could have applied for a mere discontinuance. The facts of this case demonstrate that it chose not to take these alternate actions. Rather, the railroad sought abandonment and acted upon this intention.

Therefore, under the *Vogler* test, the railroad effected a state law abandonment. The *Vogler* test has been utilized as the sole inquiry by Maryland courts with respect to abandonments alleged to have been effected subsequent to 1910, even after state regulatory approval had been required by state law, and subsequent to 1920, when, by federal statute, federal approval supplanted state approval. *See e.g. D.C. Transit II,* 290 A.2d at 810-12; *Maryland & P.R. Co.,* 166 A.2d at 250-51 (abandonment found when service vacated, despite no appeal for any type of regulatory approval).

Defendants further point out that abandonment under Maryland law from 1910 onward required appeal and

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[25] In its 1988 contract with CSX, Montgomery County agreed to seek common carrier status under 49 U.S.C. § 10901 in the event it did not get certification under the Rails-to-Trails Act.

regulatory approval from a state commission, thus adding an extra step, under state law, before the lapsing of a right-of-way and the enjoyment of unencumbered title by the underlying fee owner.[26] With the passage of the Transportation Act of 1920, the federal government placed the state regulatory structure under the governance of the ICC. Defendants argue that ICC approval parallels prior Maryland Public Service Commission ("PSC") approval and is necessary in order to establish state law abandonment.

The enactment requiring state regulatory approval by the Public Service Commission is 1910 Md. Laws ch. 180. It provides that regulatory approval be subject to an inquiry into whether abandonment will suit the public needs. It provides,

> No common carrier, railroad corporation, or street railroad corporation shall begin the construction of a railroad or street railroad, or any extension thereof, or **exercise any franchise or right** under any provision of the railroad law, or of any other law not heretofore lawfully exercised, **without first having obtained the permission and approval of the commission. The commission shall have power to grant the permission and approval herein specified whenever it shall, after due hearing, determine that such construction or such exercise of the franchise or privilege is necessary or convenient for the public service.**

1910 Md. Laws ch. 180, § 26 1/2 (emphasis added).[27]

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[26] Maryland courts applied the 1910 statute in the abandonment analysis when a right-of-way was created prior to 1910 and abandoned thereafter. *See Benson,* 118 A. 852.

[27] This provision's specific application to abandonment was clarified in 1914 in 1914 Md. Laws ch. 445, § 1. ("The provisions . . . empowering the commission to grant such permission and approval . . . after due

The Maryland Court of Appeals was faced with the task of deciphering the meaning of the phrase "necessary or convenient for the public service" in *Benson v. Maloy*, when citizens petitioned the court to overturn a Public Service Commission approval of abandonment, objecting to it based upon their need to utilize the railroad in question. *Benson,* 118 A. 852. The *Benson* court stated as follows:

> What constitutes for a common carrier the elements which make the operation of the roads necessary or convenient for the public service? Suppose it be a single passenger a day, is he the public? If not, what other measure can be found by which to formulate the meaning to be given this expression? Manifestly from the adjudicated cases, **the only safe criterion in that regard is that which has heretofore been laid down by the court, the measure of which is the ability of the road from its earnings to meet its operating expenses and fixed charges,** to say nothing of any return whatever to the stockholders of the company.

Benson, 118 A. at 854 (emphasis added). The *Benson* court expanded upon the considerations of public interest weighing in favor not compelling the operation of a railroad which has deteriorated to a point where its continued operation would inevitably lead to catastrophe for which the railroad would not have the means to compensate any injured. *Id.* These pronouncements provide guidance as to what post-1911 PSC approval of abandonment in Maryland would require. However, this standard is not as rigorous as the one suggested by Defendant or applied by the ICC.

The ICC in 1988 conducted a parallel inquiry into public convenience and necessity and found that abandonment was

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hearing . . shall likewise apply to the abandonment or discontinuance in whole or in part by any common carrier, railroad corporation. . . .")

proper. *See* A-112-125. To make the abandonment determination the ICC utilized the standard of *Colorado v. United States,* 271 U.S. 153, 168 (1926), and ". . . weighed the potential harm to affected shippers and communities from abandonment against the burden from continued operation on the railroad and interstate commerce," -- a higher standard than that adopted by the PSC in *Benson*, which looked less to the affected shippers and communities and more toward the financial state of the railroad. *See* A-118. Nevertheless, the ICC examined both issues of public ridership on the line and financial hardship, and still found abandonment appropriate, although it postponed its implementation as required by the Rails-to-Trails Act.

The ICC noted that the two remaining users of the railroad in 1985 had contracted with CSX to receive deliveries by truck which would have been placed upon the Georgetown Branch, and that no other party expressed a desire to use the railroad. *Id.* at A-115. The ICC also analyzed the financial condition of the line, and noted that repair of the railroad alone would cost some $573,000, use of the line had declined 91.1% from 1969-1985 and continued use of the line would cause CSX to incur significant opportunity costs. *Id.* at A-116. Upon these and other related based, the ICC concluded as follows:

> **The present and future public convenience and necessity permit abandonment by CSX of the line of railroad described above,** subject to (1) the employee protective conditions in Oregon Short Line R. Co. -- Abandonment -- Goshen, 360 I.C.C. 91 (1979); (2) the condition that CSX keep intact all the right-of-way, . . . for a period of 180 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of

the right-of-way for public use; and (3) the environmental and other conditions discussed above.

Abandonment of the line will not result in a serious adverse impact on rural and community development.

See A-125 (emphasis added).

The only condition deferring actual abandonment on February 25, 1988 was the provision for the 180-day inquiry into Rails-to-Trails recreational and preservational uses as provided in the Rails-to-Trails Act. This inquiry into a possible sale for future railroad and recreational uses was simply not part of Maryland's Public Service Commission analysis. Further, the fact that CSX sought voluntarily to negotiate with purchasers under the 180-day CITU does not indicate that abandonment had not occurred. To the contrary, had state law and not federal ICC regulations governed this area, once the February determination had been issued, the right-of-way would have reverted.

Thus, to the extent the creation of the PSC in 1910 added an extra step to state law abandonment, state law abandonment still must be considered to have occurred. Abandonment under this rubric took place at the very latest on February 25, 1988 -- the date of the ICC order, because the order provided, at a minimum, the rough equivalent of the PSC abandonment authorization.

In conclusion, assuming that the railroad right-of-way was an easement, such an easement was, in fact, abandoned under state law. As abandonment did occur, it is not necessary to decide whether Montgomery County's intended uses of the corridor for a light-rail and hiker/biker trail are within any original right-of-way easement.

3. Taking

Again, as concluded above this case is appropriate for summary judgment at this juncture because by their 1911 deed, CCLC conveyed to MSRR a fee simple absolute interest. It has been determined that CCLC retained no residual interest in the land subsequent to this purchase. Therefore, there can be no taking of CCLC's property. *See e.g. Preseault,* 100 F.3d at 1549-52. However, had MSRR received only an easement in 1911, the absence of a Fifth Amendment taking would not be a foregone conclusion.

In asserting that a taking has occurred, CCLC states that it owned the fee simple absolute estate underlying the right-of-way property prior to its granting of an easement to MSRR -- which was effected in 1891 and memorialized and recorded in the 1911 deed. From 1911 through 1985, MSRR maintained the right-of-way for its railroad. At the latest, MSRR and its parent companies abandoned the right-of-way on February 25, 1988, and, if it is assumed that it was held only pursuant to an easement, the easement lapsed at that time. To the extent that Montgomery County now plans to physically possess this parcel and utilize it for a light-rail and hiker/biker trail, CCLC claims such physical invasion under these circumstances constitutes a taking of a new easement.

Relying largely upon *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), Defendants assert that no taking may be held to have occurred. They point out that in 1911 -- the year CCLC deeded the right-of-way to MSRR -- CCLC could not have harbored any expectation of an abandonment of the right-of-way easement without the approval of a state regulatory body. *See id.* (antecedent inquiry with respect to expectations appropriate for per se taking). This, Defendants argue, is because Maryland statutory law enacted in 1910 placed the authority to approve

abandonment within the ambit of a state regulatory agency, called the PSC. The necessity of application to and approval by this state-imposed regulatory regime, they assert, defined and diminished CCLC's expectation of gaining a full reversion of its property interest. Further, even if the Maryland state law did not create an environment in which postponement of abandonment could be effected for the particular purposes of trail or light-rail use, they contend that the state legislation injected basic background principles within the property interest of CCLC such that it generally could not expect a reversion and abandonment free of regulatory control.

A taking may result from the denial of use of property as well as from taking of actual title and/or physical occupation of property. *See Lucas*, 505 U.S. at 1028-29; *Chicago, R.I. & P.R. Co. v. United States,* 284 U.S. 80, 96 (1931). The takings analysis was articulated by Justice Holmes' in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), where he stated "if a regulation goes too far it will be recognized as a taking." To facilitate decisions based upon this general statement of the law, courts have utilized a three-tiered approach in which a court weighs (1) the character of the governmental action, (2) the economic impact of the regulation, and (3) the extent to which that action interfered with the owner's legitimate, investment-backed expectations. *Penn Central v. City of New York,* 438 U.S. 104, 124 (1978), *cited in Babbitt v. Youpee,* 117 S. Ct. 727, 731 (1997). However, in two cases, this analysis is circumvented: (1) when regulation deprives property of all economic value -- a confiscatory regulatory taking, and (2) when regulation results in a permanent physical occupation of land -- a *per se* physical taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), *cited in Lucas v. South Carolina Coastal Council,* 505 U.S. at 1015.

If it is assumed that MSRR did not acquire fee simple absolute title in the right-of-way, but rather a railroad easement, the facts of this case would then place it squarely within the per se physical taking category. First, the Rails-to-Trails Act would then provide for an easement upon property under the fee ownership of CCLC, which would allow for the physical invasion of this property by others. *See id.* Physical occupation is considered to occur both when there has been invasion of a fee interest as well as when there is occupation of an easement. *See Kaiser Aetna v. United States,* 444 U.S. 164, 180 (1979) (occupation of a navigational servitude constitutes a physical taking); *United States v. Causby,* 328 U.S. 256, 265 (1946); *Portsmouth Co. v. United States,* 260 U.S. 327 (1922).

Second, the invasion qualifies as permanent within the context of takings jurisprudence. The term "'permanent' does not mean forever, or anything like it," but rather, means an invasion that is not "transient or relatively inconsequential" as would amount to "no more than a common law trespass. . . ." *See Hendler v. United States,* 952 F.2d 1364, 1376-77 (1991), *cited in Skip Kirchdorfer, Inc. v. United States,* 6 F.3d 1573, 1582 (1993). Further, it does not require any particular individuals to station themselves permanently upon the premises. *See Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), *cited in Hendler,* 952 F.2d at 1377. In this case, the right-of-way corridor, pursuant to the Rails-to-Trails legislation, will continue to be physically occupied subsequent to when it would have been abandoned pursuant to Maryland law. Further, the occupation may continue indefinitely until rail service is again necessary, and may, hypothetically, resume subsequent to rail use, and continue in this loop forever. Such an occupation must be considered permanent.

Once a party has shown either a full confiscation of use of property or a permanent physical occupation, before a court may determine that a taking has occurred *per se*, an antecedent inquiry must be conducted into the existence of any possible "pre-existing limitations" upon the property involved. *See Lucas,* 505 U.S. at 1028-29 (investigation into analytical framework for *per se* regulatory taking also discussed the framework to be utilized for *per se* physical takings).

The Court of Appeals for the Federal Circuit recently stated in *Preseault* in the context of another taking alleged to have resulted from the implementation of the Rails-to-Trails Act, that the factors which may place a pre-existing limitation upon a property right and preclude the finding of a *per se* physical taking, are those limitations which are found within state common law[28] prior to the creation of the property interest. The *Preseault* court defined that whether a per se physical taking has occurred therefore revolves around an antecedent inquiry of whether the legislation at issue (1) was enacted prior to the creation of the property interest at issue, and (2) has an effect which could not be anticipated under state common law as it existed at the time of creation of the interest. *See Preseault,* 100 F.3d at 1538-39 (citing *Lucas,* 505 U.S. at 1029-32).

However, the implications of this formulation of the antecedent inquiry with respect to the possibility of state or federal statutory law influencing a property right are not fully expounded by the *Preseault* court. *Preseault* merely

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[28] *Lucas* involved common law nuisance constraints placed upon property owners; however, other common law limitations on property owners may involve zoning or the police power of the state to protect public safety, health and morals. *See Hage v. United States,* 35 Fed. Cl. 147, 152 (1996) (citing *Bennis v. Michigan,* _ U.S._, 116 S. Ct. 994, 134 L. Ed. 2d 68 (1996).

presented the question of whether federal legislation passed subsequent to the creation of a property right inhered in the title owned by the Preseaults. The court answered this question by determining that state common law was the only discipline from which to draw background principles inhering in a property interest; and that state statutory law passed subsequent to the creation of a property interest could give rise to a taking. *Preseault,* 100 F.3d at 1543, *citing Lawson v. State,* 107 Wash. 2d 444, 730 P.2d 1308 (1986) (*in banc*).

The Preseault court was not presented with the issue at hand in the instant case -- whether a state statute enacted prior to the creation of a property interest will be considered to merge into and become a part of the common law for purposes of considering whether a taking of such property interest has occurred.[29] However, in *Lucas*, while grappling with the issue of whether a property interest was informed by state nuisance law for purposes of the *per se* regulatory taking antecedent inquiry, the Supreme Court addressed the issue somewhat differently in its discussion of physical

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[29] Interestingly, the *Preseault* court apparently rejected the possibility that federal statutory law passed prior to the creation of a common law property interest would be factored into the background principles which may inhere in a subsequently created property right. *See Preseault,* 100 F.3d at 1539 (discussion of *California Housing Securities, Inc. v. United States,* 959 F.2d 955 (Fed. Cir. 1992)). The court distinguished California Housing Securities, where it held a physical taking did not occur due to a lack of compensable property interest because of federal statutory regulation of the banking industry, because in that case the alleged taking was effected pursuant to a statutory enforcement action to punish prohibited conduct, an entirely different category of takings cases. This new category may encompass cases such as *Bowman v. United States,* 35 Fed. Cl. 397 (1996) (no taking when compensation alleged to be due for deprivation of property by forfeiture when forfeiture alleged invalid due to double jeopardy). *Cf. Scranton v. Wheeler,* 179 U.S. 141 (Constitution may serve as basis for pre-existing limitation).

takings. It provided that the assertion of a pre-existing federal easement, as was at issue in *Scranton v. Wheeler*, -- would not constitute a taking. *Scranton v. Wheeler,* 179 U.S. 141 (1900). The federal navigational easement was held to inhere in the title because it existed by a federal statute enacted pursuant to the Constitution's Commerce Clause.[30] Const. art. I, § 8. Thus, although *Lucas* does not directly discuss whether state or federal statutory law previously enacted affects prospective title, it recognizes that Constitutional concerns would affect title.

Under this formulation of physical takings law, it would seem, state legislation passed prior to the creation of a property right will be infused into the particular state's common law and will necessarily inhere in and limit the breadth of the possible property rights which may be established subsequent to each statutory enactment. This formulation has merit because it provides that property interests created prior to enactment of limiting regulation would be protected from its effects, yet, at the same time, legislatures would retain the ability to influence prospectively created property rights according to the evolving moral and practical needs of the times.[31]

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[30] Considering the Commerce Clause as a pre-existing limitation would certainly lend a very broad interpretation of the background principles which could potentially limit one's property interest, perhaps so broad as to swallow up the *per se* taking rule altogether. Cases involving any federal regulation involving physical occupation such as *Hendler,* 952 F.2d 1364, could be categorized as involving pre-existing Commerce Clause limitations.

[31] A rule which prohibited federal or state statutes from influencing and changing the common law and thus the realm of property interests prior to their establishment would freeze the State's common law as it existed perhaps either at the time of the creation of the United States, or even earlier, as it was under English common law as applied during colonial times. Such a characterization of common law as at one point

Working within a system in which state statutes may merge into common law and inform the scope of property interests created subsequently, one must look at the combined state statutory and common law of the time of the creation of MSRR's right-of-way to determine whether there was an inherent limitation in the original state law which would obviate the possibility of a taking. If the state law as it existed when MSRR's right-of-way was created contained a pre-existing limitation regulating the reversion of the land in a like manner to the Rails-to-Trails Act, only then would the finding of a *per se* physical taking be precluded. If it is found that there was no pre-existing limitation, then a *per se* taking must be held to have occurred if it is assumed that CCLC retained title. *See e.g. Preseault,* 100 F.3d at 1550-52.

Central to the takings analysis is the inquiry into the date upon which the railroad right-of-way was created. *Preseault,* 100 F.3d at 1537-38. The right-of-way in this case was deeded to MSRR in 1911 and recorded in that same year -- one year after 1910 state legislation created the PSC, the state regulatory board regulating railroad actions, including abandonment. Defendants contend that CCLC's reversionary property interest did not exist until the deed was granted, and that, as the 1910 statute creating the PSC preceded the creation of the property right, knowledge of such regulation must necessarily have informed such a reversionary interest. Maryland law has consistently required that property interests be recorded in order to be considered valid. *See United States v. Gallas,* 269 F. Supp. 141 (D. Md. 1967)

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constituting a static body of law is undoubtedly artificial. Over a century ago, in *Munn v. Illinois* it was explained, "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." 94 U.S. 113, 134 (1877).

(rule in force at present first applied in Laws ch. 14 Acts of Assembly of 1766, 1765-84 (1787)).[32]

Even crediting Defendant's contention that the interest was diminished by the 1910 statute, the 1910 law cannot be deemed to have so changed Maryland common law as to have created an environment in which abandonment regulation could objectively be expected to encompass a system in which Rails-to-Trails usage could inhere in CCLC's title such as to postpone reversion for the purpose of "railbanking" -- preserving the rail corridor for future railroad use. Prior to 1910, railroads were created by legislatively required charters, and, likewise, abandonment was formally governed by the legislature. *See P.S.C. of Md.*, 89 A. 727-28 (railroad may not be compelled to maintain its road if its charter simply authorizes its construction and maintenance). The Maryland Legislature possessed the

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[32] The documentary evidence in this case shows that the right-of-way was actually created in 1891 with the Memo Agreement and building upon the right of way was commenced during that year. Further, construction of the entire right-of-way was complete in 1910 and train service commenced in that year. Therefore, any right-of-way easement was, de facto and by necessity at the very least, although not yet formalized by deed, in existence by the time the PSC regulation was enacted. In Maryland, a defective or unrecorded deed is considered effective as between the parties, and against third persons with actual notice. *Hudson v. Warner*, 2 H. & G. 415 (1828); *Columbia Hills Corp. v. Mercantile-Safe Deposit & Trust Co.*, 231 Md. 379, 190 A.2d 635 (1963). Although this doctrine often serves to shield property owners against claims of title conflicting with their existing, albeit unrecorded, property rights, it would seem equally applicable in cases such as the instant one to be used offensively to establish the unfettered property interest required to prove a per se physical taking. Accepting this doctrine, a per se taking could be found without further analysis, because the 1910 law would be considered to have been enacted subsequent to the creation of the property interest, and therefore could not constitute a pre-existing limitation.

power to "at any time regulate, modify or change the control, use and estate of any rail road . . . in such manner as it may deem equitable towards the said corporation and necessary to the accommodation of the public travel or use of the said rail road or rail roads. Md. Code, Corporations, § 71 (1859). Notwithstanding this state regulatory power, abandonment at the time was determined according to the common law test of *Vogler v. Geiss*, requiring intent to abandon and an act indicative of such intent. 51 Md. at 410.

In 1910, with the passage of a Md. Laws ch. 180, the PSC, a regulatory body, gained the ability to permit or deny abandonment. *See Benson,* 118 A. at 854-55. However, unlike the Rails-to-Trails Act, the 1910 statute contemplated the preclusion of abandonment only in cases where there existed at the time a public necessity for continued train service, and where the provision of continued railroad service would not present financial hardship to the railroad company. *See id.* In this regard, the 1910 statute mirrored the above cited 1859 corporate provision.

The 1910 statute granted the PSC jurisdiction only over railroads for transportation purposes. It did not grant the PSC authority over any other actions that a railroad or the public might want to conduct upon a railroad right-of-way. In its jurisdictional provisions it granted the PSC authority over

> ". . . such portion of the lines of any other railroad as lie within this State . . . so far as concerns the construction, maintenance, equipment, terminal facilities and local transportation facilities and local transportation of persons or property within the State."

1910 Md. Laws ch. 180, § 3(3). Further, in its "Applicability" provisions, it expressly provided, "this Act shall apply to the transportation of passengers freight or property from one point to another within the State of

Maryland, and to any common carrier performing such service." 1910 Md. Laws 1910, ch. 180, § 12.

In contrast, the Rails-to-Trails Act's postponement of abandonment for public purposes includes (1) railbanking for **future** railroad purposes, as well as (2) use of a railroad right-of-way for non-transportation recreational purposes. These uses were simply not contemplated or even remotely foreshadowed in the 1910 law. When a party was granted a right-of-way on its property in 1911, the state law of the time had not developed to the point of including provisions for rail preservation that would cause rights-of-way to be utilized for hiker/biker trails and light-rail indefinitely until train service would again be necessary at some point in the distant future.

Thus, Maryland law as it existed in 1911 contained no pre-existing limitation upon abandonment akin to the limitation placed upon owners of fee simple interests underlying rights-of-way by the Rails-to-Trails Act. If it is assumed the right-of-way was held as an easement, state law abandonment would have occurred in the instant case at the very latest in February 1988 with the ICC determination. In 1911 any fee owner granting a right-of-way would have had no reason to expect that abandonment would be postponed for Rails-to-Trails purposes. As such, if it were to be held that the MSRR right-of-way was conveyed as an easement, as was found to have occurred in *Preseault*, operation of the Rails-to-Trails Act in postponing the reversion of the right-of-way would have effected a *per se* physical taking of CCLC's property.

Moreover, even if abandonment had not occurred in the instant case, an issue is raised with respect to whether a taking still may have occurred if Montgomery County's plans to construct a hiker/biker trail as well as a light-rail upon the right-of-way are considered outside the original scope of the

easement. Plaintiffs assert that a hiker/biker trail may not be considered to be within the scope of the original easement because the original easement was for railroad purposes, and therefore for transportation only. Defendants argue that under the doctrine of shifting public uses, the right-of-way is sufficiently broad in scope so that its use for a public recreational trail is not a violation of CCLC's rights as owner of the underlying fee estate. They maintain that the original right-of-way, if found to be an easement, could only be construed as an easement for general public purposes. As such, they contend that it is properly construed as including other public purposes besides the running of a railroad, including use as a hiking and biking trail. They assert, therefore, that no additional servitude would be placed upon the right-of-way as a result of Montgomery County's plans.

Again if it is assumed for the sake of argument that the right-of-way was conveyed in 1911 as an express easement, its scope would be governed by the intent of the parties as demonstrated by the relevant granting and incorporation documents. 5 Restatement of Property § 482 (American Law Institute 1944) (the extent of an easement created by a conveyance is fixed by the conveyance); Jon. W. Bruce and James W. Ely, Jr. The Law of Easements and Licenses in Land § 8.02[1], at 8-3 (rev. ed. 1995).

In the instant case, three documents have been produced: (1) the MSRR charter; (2) the 1891 Agreement; and (3) the 1911 deed. The railroad's charter discusses the "form[ation of] a corporation for the purpose of constructing and operating a railroad in the County of Montgomery in the State of Maryland." The 1891 Agreement also contemplated railroad use of the right-of-way. According to the 1891 Agreement, MSRR would construct its "tracks from the Metropolitan Branch [of B&O railroad in Silver Spring]. . . to Connecticut Avenue extended from the District of

Columbia, on or before the 31st day of August, 1891." MSRR also promised to give the land company the right to connect power houses by sidings to MSRR's tracks. In addition, on the same day the 1891 Agreement was executed, the parties executed a separate agreement in which MSRR granted CCLC half rates on transportation of railroad freight on the Georgetown Branch.

However, the deed makes no mention of the railroad's proposed actions or uses of the right-of-way. Indeed, the instrument contains language indicating that the 1891 Agreement was to be "mutually abrogated, cancelled find set aside." This matter raises an issue of construction -- whether the 1911 deed was deliberately free from references to railroad use because the right-of-way might from that point onward be used for any public purpose, or whether the references in the earlier documents were considered by the parties as sufficient to proscribe the railroad use upon the right-of-way.

In any event, the statutory provisions in place at the time did not specifically restrict railroad companies to conducting only railroad transportation, contemplating public travel as well as general use. *See e.g.* Md. Code Corporations, § 71 (1859) (legislature may "regulate, modify or change the control, use and estate of any rail road constructed by such corporation, in such manner as it may deem equitable towards the said corporation and necessary to the accommodation of the **public travel or use** of the said rail road or rail roads") (emphasis added); 1882 Md. Laws ch. 231, § 1 ("Act to enlarge the Powers of Railroad Companies by authorizing them to transact Express and Telegraph business"); *see also* 1880 Md. Laws ch. 279 (B&O railroad powers enlarged -- authorized to purchase the stock of other railroad companies, to aid such companies and to purchase or

lease or operate other railroads and works facilitating commerce).[33]

Thus, considering the 1911 deed language together with the statutes in place at the time, assuming the right-of-way was an easement, it cannot be said that its scope was necessarily limited to railroad or transportation uses.

However, assuming that the easement was for railroad purposes, Defendants' contention that the doctrine of shifting public uses allows for any public use of the property without the addition of another servitude, is misplaced. The court in Preseault examined this issue as defendants in that case similarly alleged that a railroad right-of-way was permitted to be used for broad purposes as a result of a shifting public uses doctrine. *Preseault,* 100 F.3d at 1541-42. The Preseault court explained that an examination of the particular state's common law is necessary in order to determine if the shifting public use doctrine is applicable. *Id.*

Defendants in the instant case have not shown that the doctrine of shifting public uses is a part of Maryland common law. Rather, the case law regarding public easements in Maryland has taken a more narrow approach than Defendants suggest. Maryland has recognized that the scope of an easement may be adjusted or expanded to serve the easement's original purpose, so long as the change is consistent with the anticipated terms of the original grant. *Baltimore County Water & Electric Co. v. Dubreuil,* 105 Md. 424, 66 A. 439 (1907); *see also* Richard R. Powell, 3 Powell on Real Property § 34.12[2] (Patrick J. Rohan ed., 1996). In Maryland, the rules of law applicable to public highways are generally applicable to railroads. *See e.g.*

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[33] Although B&O's powers were so defined in 1880, in light of the breadth of legislatively granted railroad powers, the possibility of their expansion was certainly understood.

Whalen v. Baltimore & O.R. Co., 108 Md. 11, 69 A. 390, 393 (1908). Additionally, Maryland courts have held that easements for public highways have permitted for new modes of "travel and transportation . . . such as might arise in the ordinary course of improvement." *See Dubreuil,* 66 A. at 441. Applying this rule, Maryland courts, when confronted with the laying of electric railroad tracks upon a street or a horse railway, typically held that such construction was within the original grant of a highway easement. *See e.g. Lonaconing, M. & F. Ry. Co. v. Consolidation Coal Co.*, 95 Md. 630, 53 A. 420 422 (1902); *Green v. Suburban Ry. Co.*, 78 Md. 294, 28 A. 626 (1894); *Koch v. North-Ave. Ry. Co.*, 75 Md. 222, 23 A. 463 (1892); *John Peddicord v. Baltimore, Catonsville & Ellicott's Mills Pass. Ry. Co.*, 34 Md. 463 (1871).

Yet, when confronted with the actual question of which uses were within the scope of a railroad easement, the courts have looked to whether the proposed use was within the use as anticipated in the grant of the easement. In *Potomac & Edison Co. v. Routzahn* the issue was whether the erection and maintenance of poles and wires for the transport of electric power was within the original electric railroad easement. 192 Md., 449, 460-62, 65 A.2d at 585-86; *see also Telephone Co. v. Tyson,* 160 Md., 298, 153 A. 271 (1931); *Potomac Elec. Power Co. v. Wall,* 153 Md. 229, 137 A. 899 (1927); *Amer. Tel. & Tel. Co. v. Pearce,* 71 Md. 535, 18 A. 910 (1889). It was held that if the poles and wires were not used to transport power for the benefit of the railroad, but rather to provide energy to the public as part of another commercial enterprise, that they would constitute an additional servitude. *Routzahn,* 65 A.2d at 585-86. Also in *Dubreuil* the Maryland Court of Appeals, when confronted with the issue of whether the placement of a water main in a public highway was an additional servitude, found that it was

because the right to lay such pipes was not part of the original grant. 66 A. at 441-42.

Further, in *Peck*, the Maryland Court of Appeals also clarified that when a public highway servitude is ". . . used for an [additional] purpose, even though of a public nature, which is not within the scope of the highway use for which the land was dedicated or appropriated, it is considered that the land is subject to an additional burden or 'servitude'. . . ." 410 A.2d at 12-13, (*citing* 3 H. Tiffany, The Law of Real Property § 926 at 600-02 (3d ed. B. Jones 1939)).

The principles gleaned from these cases govern the inquiry as to scope at issue in this case. Had the right-of-way been conveyed as an easement and not in fee simple absolute, and were it determined to have been conveyed expressly for railroad purposes only, Defendants could not rely upon a shifting public use doctrine to expand its scope.

In conclusion, if it were held that CCLC retained title to the property and it were assumed that the scope of MSRR's right-of-way was limited to railroad uses, to the extent that Montgomery County now plans to physically possess this parcel and utilize it for a light-rail and hiker/biker trail, such physical invasion would constitute a taking of a new easement for these uses, and result in a physical per se taking. *See Preseault,* 100 F.3d at 1550-52 (*citing Loretto,* 458 U.S. 419).

Were it assured that abandonment had not occurred, and that CCLC retained title, in all probability the scope of the MSRR easement which Montgomery County would then have obtained by quitclaim deed on December 16, 1988 is not sufficiently broad as to fully encompass the activities now contemplated for the property.

Further, as Montgomery County acted under the Federal Government's authority pursuant to the ICC's Certificate of

Interim Trail Use in gaining possession of the right-of-way, the United States would be liable for the taking effected. *See id.* at 1551, *citing Hendler,* 952 F.2d at 1378-79 ("when the Federal Government puts into play a series of events which result in a taking of private property, the fact that the Government acts through a state agent does not absolve it from the responsibility, and the consequences, of its actions").

Consequently, if it is assumed, contrary to the conclusion reached in this case, that the right-of-way was transferred to MSRR as an easement and not in fee simple absolute, it follows that a taking would have occurred, and Plaintiff, CCLC would then be entitled to summary judgment in its favor.

C. Taking Claim of the Columbia Country Club

1. Property Interest

The Columbia Country Club asserts in its motion for summary judgment that it possesses an interest in approximately 3.89 acres within the right-of-way at issue in this case. Pursuant to the doctrine of adverse possession, or alternatively, lost deed, the Club claims to have acquired fee simple absolute property interests prior to 1986 in a portion of the land abutting the tracks within the right-of-way. *See* CBA-36.[34] Second, the Club contends that it possesses three easements upon the MSRR tracks, as well as a fourth easement by prescription[35] crossing the width of the right-of-

[34] Later in its pleadings the Club contradicts its earlier claim as embodied by its survey map, and contends that it has by adverse possession acquired ". . . all rights to the Strip, except for the actual tracks and the immediately adjacent land required to support those tracks." CCC Reply at 6.

[35] The Club has asserted an easement by adverse possession, which is properly termed an easement by prescription.

way, use of which commenced in 1962, providing for the alleged prescription to have occurred in 1982. CCC S. J. Mot. at 29; CBA-36. It is not entirely clear whether the Club asserts its claims of attaining adverse possession and easements rights against MSRR or CCLC. Within its submissions, the Club takes opposite positions that either CCLC or MSRR was the fee owner of the right-of-way up through 1986, and proffers alternate claims against each. *See* CCC S. J. Mot. at 3, 30-32, 44 (CCLC owned fee title and reversion after 1986); *but see* CCC Reply at n.12 (MSRR was fee owner[36], or, alternatively, abandonment has not occurred; Montgomery County is currently in possession of easement, and fee title has not yet reverted to CCLC.)

Finally, the Club asserts that Montgomery County's assumption of the right-of-way constitutes an unconstitutional "legislative action" resulting in the "severe impairment" of the Club's 1909 contractual agreement with MSRR.

In their cross-motions and opposition to the Club's summary judgment motion, Defendants differ with respect to the fee ownership of the right-of-way prior to 1988,[37]

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[36] The Club here states, "it is significant that the Land Company required the Club to obtain written permission from the Railroad alone to cross the Strip as a precondition to purchase of the two parcels. If the Land Company believed then, as it now asserts, that it had a reversionary interest in the Strip, it would only have made sense that it would have entered into a similar crossing agreement with the Club. No such Agreement exists, and there is no indication from the available documents that it was ever discussed or contemplated." CCC Reply at n. 11; see also CCC Reply at n. 12 (no reversion occurred).

[37] Although abandonment may have occurred as early as 1986, the date of the ICC order -- February 25, 1988 -- approving abandonment subject to Rails-to-Trails provisions will be utilized as the abandonment date in discussing the Club's alleged property rights.

however, they concur in asserting that the Club cannot establish adverse possession for several reasons, the most salient of which being that the Club's use of the land pursuant to license agreement was neither hostile nor exclusive. They further assert that no easements were created either expressly or as a matter of law. Plaintiff, CCLC, has also tendered a cross-motion for summary judgment with respect to the Club's taking claim. However, to the extent this motion concerns claims between the two private parties it cannot be so addressed. *See Rolls-Royce Ltd. v. United States and United Aircraft Co.,* 364 F.2d 415, 176 Ct. Cl. 694 (1966); *McPherson v. United States,* 2 Cl. Ct. 670 (1983) ("if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of this court. . . .").

A. Adverse Possession

Adverse possession requires a period of twenty years to accrue. *See East Washington,* 223 A.2d at 603-04, *cited in Read,* 643 A.2d at 479. Under Maryland law the burden of proof with respect to a claim of adverse possession rests with the claimant. *See Costello v. Staubitz,* 300 Md. 60, 66-67, 475 A.2d 1185, 1188 (1984). To establish adverse possession, ". . . the possession must be actual, hostile, open, notorious, exclusive, under claim of title or ownership, and continuous and uninterrupted for twenty years." *East Washington,* 244 Md. 287, 294, 223 A.2d at 603-04 (1966), *cited in Read v. Montgomery Cty.,* 101 Md. App. 62, 68, 643 A.2d 476, 479 (1994). Each element of adverse possession must be present in order to establish this claim. *Hungerford v. Hungerford,* 234 Md. 338, 339-40 199 A.2d 209, 210-11 (1964).

Once the above elements have been established, in order to succeed in a claim of adverse possession versus a public entity, such as a railroad, a party must also illustrate two

additional elements: 1) that the parcels claimed were not acquired by the railroad through a public grant -- meaning by an act of congress; and 2) that the land at issue had not been devoted to a public use. *Read,* 643 A.2d at 479.

The Club has asserted that adverse use began in 1909 with respect to the portions of the right-of-way adjacent to the land acquired by the Club in 1909, and adverse use of the final parcel began in 1962 on its fourth golf cart crossing west of Tee 2. Thus, the Club maintains that adverse possession of different parcels occurred as early as 1929, and as late as 1982, during the years when MSRR owned the right-of-way. As it has been determined that MSRR held title to the right-of-way in fee simple absolute since 1911, the property interests asserted as against MSRR will first be addressed. The interests asserted under the assumption that CCLC held title to the right-of-way will then be discussed.

1. Case of MSRR Having Fee Title to Right-of-Way

a. Permission by License Agreement

In order to establish that possession is hostile for purposes of adverse possession, use of the land may not be pursuant to the license or permission of the owner. *Zimmerman v. Summers,* 24 Md. App. 100, 110-11, 330 A.2d 722, 729 (1975). Based on the facts presented, the Club has not established hostility as against MSRR. The license relationship has been defined as "a simple recognition that one who is on land with the permission of the landowner[38]

[38] A license need not be granted by the landowner, it may also be granted by any party with an interest in land superior to the licensee. "A license, being a simple permission to enter land, may be extended by any person who has a right to be on the land even though that person's interest in the land may amount to less than fee simple ownership. . . . Thus, one who has nothing more than a possessory interest in the land may give a license to another and the only effect of the granting of the license is that the licensee's presence on the land will not be a wrong as

cannot be committing a wrong as to such landowner -- by definition, it is a permission to use land." 8 Thompson on Real Property, § 64.01(a) (1981). This permission can be revoked at any time. *Id.*; *See Zimmerman,* 24 Md. App. at 110-12, 330 A.2d at 729; *Condry v. Laurie,* 184 Md. 317, 320-21, 41 A.2d 66, 67-68 (1945).

In the instant case, the Club recognizes and offers as evidence a 1909 contract, by which MSRR granted the Club license and permission to cross over and upon the right-of-way in conjunction with the Club's use of the land it intended to purchase from CCLC as a golf course. The document provides that the Club ". . . contemplates the location and maintenance on a portion thereof of a golf course,. . ." and states that MSRR granted to the Club **"permission, license or privilege** . . . to go upon, over and across the said right-of-way, road-bed and tracks of said Metropolitan Southern Railroad Company. . . ." CBA-27, 28 (emphasis added). This language allowed the Club and its members, guests and employees to utilize the right-of-way in conjunction with the parcels it was to buy in 1909.

The Club has not offered evidence of revocation or that the Club's possession turned adverse at any point prior to filing this suit. Consequently, to the extent this license gave the Club and its members and guests the right to utilize the right-of-way in conjunction with its golf course, this license remained in effect up through MSRR's relinquishment of its interest in the right-of-way. *See Hungerford,* 199 A.2d at 211. Even assuming Montgomery County has not reinstated the previous license, there can be no adverse possession because the Club's present, allegedly adverse use has not

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to the licensor." 8 Thompson on Real Property, § 64.02(a) (1981); *but see DC Transit I,* 270 A.2d at 800-01 (easement holder may not grant rights as against fee owner).

approached the 20-year minimum necessary to establish adverse possession.

b. Application of License

The 1909 license agreement certainly applied to use of the right-of-way adjacent to the parcels which the Club contemplated buying from CCLC in 1909. The question remaining is whether the license applied to crossing over and upon the right-of-way adjacent to the portions of the Club's golf course acquired in later years -- 1913, 1919 and 1940 -- and generally west of "Tee 2" on the golf course. See CBA-36.

In interpreting the import and extent of license agreements, it is considered that "the rights of a licensee are fixed by the agreement creating the license, if there is one. If there is no agreement, or the agreement does not fix the rights of the parties with respect to the matter in issue then it becomes a question of the reasonableness of the expectations of the parties." 8 Thompson on Real Property, § 64.04(a) (1981), (*citing* Restatement of Property § 516 (1944)).

First, the license in this case conferred the right to cross over the tracks, as well as upon the right-of-way in general in accord with the Club's purpose of utilizing its land purchased in 1909 on either side of the strip as a golf course. The permitted use was not limited to any specific portion of the right-of-way as only the part adjacent to the Club's 1909 purchase. Rather, the license agreement acknowledges that the Club "**. . . contemplates the location and maintenance on a portion thereof of a golf course, and that [MSRR] owns and maintains a right-of-way, road-bed and track running through and across the said land of the said Columbia Country Club,** . . . ." CBA-27.

The license anticipates broad use by granting

> "permission, license or privilege . . . **to go upon, over and across the said right-of-way, road-bed and tracks of said Metropolitan Southern Railroad Company during the day time, and at such points thereon as may be hereafter agreed upon by the parties hereto in writing. . . .**"

CBA-27, 28 (emphasis added). Subsequently, in the clause pertaining to the indemnification agreement and consideration between the parties, the text again refers to the Club's potential liability which might be accrued ". . . while [the Club was] using, crossing or upon said right-of-way, road-bed or tracks of the said Metropolitan Southern Railroad Company. . . ." CBA-28.

Based upon these features of the license, it is reasonable to construe the agreement as covering use of the right-of-way touching upon any part of the golf course. This would comprise use of parts of the right-of-way adjacent on one or both sides to parcels acquired by the Club subsequent to the signing of the agreement -- parts of the right-of-way including the crossings and landscaping to the west of tee #2 adjoining the parcels acquired from CCLC subsequently in 1913, 1919 and 1940.

In accord with this construction of the license agreement is evidence, in the form of a 1982 letter from the Club to CSX illustrating that the Club understood the agreement in this way. The letter states in pertinent part,

> Upon further research of our corporate records, Mr. Spencer located an old agreement dated November 11, 1909 between the B&O and the Columbia Country Club. In view of this agreement, a new one will be unnecessary.

MC Opp. Exh. 4, July 8, 1982 Letter from J. Trotman to CSX. In this letter the Club concluded that the permissive

license covered its entire usage of the right-of-way in 1982, meaning use adjacent to parcels bought subsequent to 1909. The Club has not offered evidence that its use increased since 1982.[39] Therefore, it is determined that the 1909 license agreement covered the Club's entire use of the right-of-way up through 1986.

c. Recognition of Title

Even had the license agreement not been entered or not covered the entire scope of the Club's use, the element of hostility necessary to adverse possession has not been established. To show the hostility essential to acquisition of title by adverse possession requires possession by claim of right, unaccompanied by any recognition, express or inferable, from the circumstances, of the real owner's right to the land. 4 Tiffany, Real Property, § 1142, (3d ed. 1972), *cited in Hungerford,* 199 A.2d at 211. Where the original entry and subsequent occupancy of land is pursuant to contract, or with the consent or permission of the owner, possession will not be considered hostile and may not evolve into title, unless the record owner has notice that the continuing possession is under a claim of right. *Hungerford,* 199 A.2d at 211, *citing Feldstein v. Segall,* 198 Md. 285, 81 A.2d 610 (1951); *Waitemeyer v. Baughman,* 63 Md. 299 (1885); *Armstrong v. Risteau,* 5 Md. 256 (1853). Moreover,

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[39] The Club's recorded minutes from 1914 reflect that the board authorized one member at that time to enter into arrangements with the officials of the B&O railroad for the purpose of securing "right of way across their tracks," with the understanding that the railroad would not be held liable for accidents that might occur, *see* FDA 128-30, Minutes from May 20, 1914 (emphasis added); FDA 102, does not detract from the fact that the Club had already acquired a license from MSRR, B&O's subsidiary. It would appear that the Club sought a right of way, or easement, to supplement or perhaps, to supplant its previously granted license, because it already held and was certainly cognizant of its agreement with MSRR.

an original permissive possession is presumed to continue. *Hungerford,* 234 Md. at 341, 199 A.2d at 211. Therefore, transition to adversary possession must be proven by affirmative evidence. Id.

In addition to the language of the 1909 deed, the Club's subsequent actions even from just a few years after the Club's purchase, illustrate that the Club indeed realized that it had only a license and not an interest in land. Minutes of the Club's board of governors from 1914, subsequent to its acquisition of additional adjacent tracts of land in 1913, reflect that a Dr. Harban [a board member] was authorized to enter into arrangements with the officials of the B&O railroad "for the purpose of securing right of way across their tracks," and limiting its liability. FDA 128-30, Minutes from May 20, 1914; FDA 102. As the Club sought to acquire right-of-way over the tracks, the Club realized it did not have title.

Much later, in the 1980's, letters from Club counsel to CSX and CCLC with respect to its interest in all portions which it used of the right-of-way evidence that the Club recognized the title of other parties in the right-of-way. In its 1982 letter to CSX, the Club admitted that it had to secure right of passage at that late date, illustrating that it recognized MSRR or CCLC as the owner of the land. *See* MC Opp. Exh. 4. Again, in 1986, after MSRR had expressed its intent to seek to abandon its service on the right-of-way, counsel for the Club made numerous attempts to secure passage over the right-of-way and in doing so recognized the ownership of others. In February 1986 Club counsel wrote to CCLC, recognizing the possibility that CCLC had a reversionary interest in the right-of-way upon abandonment of service. SA-21, February 19, 1986 letter from K. W. Parkinson to CCLC. Then, in August 1986, counsel for the Club recognized CCLC's underlying title, by writing to

CCLC requesting "to acquire . . . its right of reverter for that portion of the right-of-way which transits the Club property." MC Opp. Exh. 3, Aug. 11, 1986 letter from K. W. Parkinson to CCLC.

Apparently aware of the possibility that CCLC might not have underlying title, in April 1986 Club counsel contacted CSX Transportation Company to secure continuing permission of passage over the right-of-way.

> [W]e . . . are very much concerned about the rights of the parties related to the railroad right-of-way through the golf course. . . . We would like to explore all avenues so as to protect the beautiful golf course at the Club.

MC Opp. Exh. 5, April 18, 1986 letter from K. W. Parkinson to CSX.

This correspondence illustrates that the Club recognized CCLC's or MSRR's fee simple title to the land prior to the purchase by Montgomery County. If the Club had acquired title by adverse possession, it would not have sought to enlist others in protecting its interest. The act of asking for permission for use is evidence that use of land is not hostile or adverse. *See Zimmerman,* 330 A.2d at 729. Therefore, it is not possible for the Club to assert a valid claim of adverse possession over any portion of the right-of-way during the period from 1909 through 1988, the year when MSRR conveyed the right-of-way to Montgomery County by quitclaim deed. Additionally, as the essential element of hostility has not been established, inquiry into the public nature of MSRR's ownership and use of the right is not necessary. Further, subsequent to Montgomery County's acquisition of the right-of-way, twenty years have not passed, and thus, adverse possession against Montgomery County could not have occurred.

2. Case of CCLC Title To Right-of-Way.

Assuming that MSRR acquired only an easement in 1911 and that CCLC owned the fee underlying the right-of-way, the Club still cannot establish adverse possession. Adverse possession may be established as against a non-public entity fee owner despite the existence of easements, including public easements to the county or state. *Desch v. Knox,* 253 Md. 307, 311, 252 A.2d 815, 817 (1969), *citing* 4 Tiffany, The Law of Real Property § 1141, (3d ed. 1939); *See Read,* 643 A.2d at 481. Nonetheless, the Club's claim, similar to its claim against MSRR, fails for lack of hostility.

Although it asserts adverse possession, the Club has alleged and presented evidence illustrating the permissive nature of its entry upon and use of the right-of-way. First, the Club has asserted that CCLC granted the Club the right to use the land as a condition of the 1909 purchase. In support of this assertion, the Club points to an undated option document which illustrates this permission to cross over the railroad tracks as part of the contract and deed of sale of 1909 between the parties. Additionally, a broader permission to utilize the right-of-way is implicit in the deed which specially grants the two parcels for use as a golf course. The deed provides,

> . . . the land and premises hereby conveyed shall only be used for the purpose of a Golf Course and Club grounds, . . . [and CCLC] hereby covenants to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite."

CBA-34.

The Club asserts that CCLC not only approved of the use, but actually encouraged the Club to strike the 1909 license agreement with MSRR in order to ensure that its use

would go unhindered. The Club itself states in its summary judgment brief,

> When CCLC deeded the future golf and country club land to CCC by the Deed dated November 22, 1909, it knew the land was to be used for a country club and golf course. In fact the deed required it to be so used. It also knew CCC required as a condition of purchase, **free passage over the Strip** and that such permission was being obtained in writing from the MSRR at approximately the same time, obviously as part of the same general transaction. CCLC and CCC never **signed a written agreement permitting passage, presumably because they knew that such a right of passage was clearly implied and understood."**

See CCC S. J. Mot. at 14.

Where, as occurred in the instant case, a party enters into possession of land pursuant to the terms of an oral agreement, as alleged by CCC to have been entered with CCLC, the party cannot acquire title to the land. *Walsh v. McIntire,* 68 Md. 402, 13 A. 348, 351 (1888), *cited in Hungerford,* 199 A.2d at 211.

Additionally, as stated above, in its 1986 correspondence, the Club recognized that once the parcel was transferred, its rights to use could potentially be jeopardized. Considering these facts, adverse possession as against CCLC -- under the assumption that CCLC owned the fee underlying the right-of-way -- is precluded.

B. Lost Deed

Further, neither fee title nor an easement may be established pursuant to the theory of lost deed. Lost deed is a presumption that a deed would have been passed to a party, or that the party was entitled to title, or that ancient title was

passed and lost. 2A C.J.S. Adverse Possession § 317 (1972). The doctrine has been invoked in cases

> **where an ancient rifle deed has been lost, or where a fact is to he established which occurred at so remote a period that no contemporary is living to testify as to its existence.** It is justified by the infirmity of human nature, the difficulty of preserving muniments of title and the public policy of quieting title by supporting long and uninterrupted possession and use, and is founded on the consideration that **the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of rifle to, or an admission of an existing adverse title in, the party in possession.**

Id. § 318 (emphasis added).

Where there is undisputed evidence as to the origin of title, and the grant asserted is not consistent with such title, a lost deed or grant will not be presumed. *Hammond v. Ridgely,* 5 H. & J. 245, 264, 9 Am. Dec. 522 (Md. 1821). Further, ". . . a grant will not be presumed when the possession [of the party asserting lost deed or grant] is explained by evidence showing that it was taken in virtue of some qualified interest or estate, less than that of absolute title, . . ." *Colvin v. Warford,* 20 Md. 357, 395 (1863).

In this case, the parties have provided actual deeds showing evidence of the conveyance of title to the right-of-way to MSRR. The Club took a lesser interest, a license, not a property interest. Additionally, all deeds conveying land from CCLC to the Club mark Club property boundaries as those of the railroad right-of-way -- the 1909 conveyance as well as those of the smaller additional parcels from CCLC to the Club in 1913, 1919 and 1940. Further, the Club itself

recognizes that the title was given intentionally to another party by alleging in its complaint,

> "[b]ut for the [intent of CCLC to convey the right of way to MSRR . . . CCLC] would logically have included that bisecting [right of way] and conveyed it to CCC in fee simple together with the separated parcels of land acquired by CCC. . . .

Therefore, the doctrine of lost deed cannot be employed to salvage fee title or an easement for the Club.

C. Easements

The Club alternatively asserts that it gained easements upon the right-of-way[40] pursuant to several theories, including estoppel, prescription, implication, necessity and lost deed. It has been determined that MSRR received fee simple absolute title to the right-of-way in 1911, and that MSRR granted a license to the Club that existed up until the date it transferred the right-of-way property to Montgomery County by quitclaim deed. Montgomery County has asserted that it has allowed the Club to "continue its use of portions of the right-of-way under the license. . . . [and] it has made accommodations for passage of golfers, golf carts and golf maintenance equipment." MC Opp. at 20 n.5. It also assertedly has offered crossing to the Club consisting of underpasses connecting the north and south portions of the golf course. MC Opp. at 20 n. 5. However, the extent to which crossing will be allowed or feasible is unclear, as is the time at which the tunnels will be constructed. Therefore, the possibility of the existence of easements will be explored.

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[40] Consistent with its assertion that it obtained the adjacent land by adverse possession, the Club has asserted that it has four easements over the actual tracks only. As the Club did not adversely possess any of the right of way land, for crossing to occur, easements spanning the entire width of the strip would be necessary.

1. Easement by Estoppel

The Club cannot prove that any licenses extended by MSRR or CCLC were converted into easements by estoppel. Under Maryland law licenses are not held to run with the land and therefore cannot develop into property interests. *See Baltimore v. Brack,* 175 Md. 615, 3 A.2d 471 (1939), *cited in Busada v. Ransom Motors, Inc.,* 31 Md. App. 704, 705-6, 358 A.2d 258, 259 (1976). In keeping with this doctrine, Maryland courts have held that licenses are revocable, whether or not they are executed by the expenditure of money by the licensee, and therefore they will not be held to exist under the theory of estoppel. *See Busada,* 31 Md. App. 704, 358 A.2d at 259; *Brehm v. Richards,* 152 Md. 126, 132, 136 A. 618 (1927). Consequently, when the right-of-way at issue in this case was sold to Montgomery County, the Club's license was revoked and the only property interest the Club could obtain would be an easement existing subsequent to and independent of the license.

2. Prescription

Based upon the facts of the instant case a prescriptive easement cannot be established. "In order to establish an easement by prescription, it is necessary to prove an adverse, exclusive and uninterrupted use of the way for twenty years." *Condry,* 41 A.2d at 67 (1945).[41] To be adverse, the use must be without permission or license. *Clayton v. Jensen,* 240 Md. 337, 343, 214 A.2d 154, 158 (1965), *cited in Hoffman v. United Iron & Metal Company, Inc.,* 108 Md. App. 117, 136, 671 A.2d 55, 64 (1996). A license is a permission or personal and revocable privilege. *Sinclair Pipe Line Company v.*

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[41] Due to this required element of adverse user, an easement cannot be established both by necessity -- where use is pursuant to implied permission -- and by prescription, as the Club has attempted to establish. *Feldstein,* 81 A.2d 610, 614.

United States, 287 F.2d 175, 176-77 (Ct. Cl. 1961), 287 F.2d at 177, *citing* Thomson, Real Property, Vol. I, § 318 (1939 ed.). An adverse use is "use of . . . the lands of another whenever one sees fit, and without asking leave . . . ." *Cox v. Forrest,* 60 Md. 74, 79-80 (1883).

As stated previously, the nature of the Club's use of the right-of-way was permissive up until Montgomery County's purchase in 1988. In addition, twenty years have not passed since Montgomery County acquired the right-of-way, and thus, prescription may not yet have occurred. *See Condry,* 184 Md. 317, 41 A.2d 66. Thus, either under a scenario where MSRR and then Montgomery County had fee title, or assuming arguendo that CCLC indeed owns the underlying fee -- and did so all along -- and that abandonment of the right-of-way and reversion have occurred, upon the agreed facts of this case, the Club cannot demonstrate easements by prescription.

3. Implication/Necessity

The Club alternatively asserts easements pursuant to both implication and necessity. The easement by necessity is a type of implied easement. There are three types of implied easements, one implied from prior use, another implied by designation on the plat of land within a subdivision and the third is an easement implied by necessity at the time of the conveyance. Cunningham, §§ 8.4-8.6, at 445-451. As the Club has not asserted or offered evidence of prior use, and the land at issue was not conveyed as part of a subdivision, the only type of implied easement which may apply to the facts at hand is the type arising out of necessity.

Through 1988 the Club enjoyed a license to cross the right-of-way; however such personal license does not negate an implied way of necessity. *See Feldstein,* 81 A.2d at 615. In cases where an easement of necessity is considered to

arise at the time of conveyance, the granting of a license will merely defer the availability of the easement until the expiration or revocation of the license. Id. Moreover, unlike the license previously granted, an easement by necessity will run with the land. *Hancock v. Henderson,* 202 A.2d 599, 236 Md. 98 (1964).

The essential elements required to establish an implied easement of necessity are (1) a conveyance; (2) unity of title concerning the parcel containing the alleged easement and the parcel for which the easement is necessary prior to the conveyance; and (3) necessity for access existed at the time of conveyance to pass over the parcel with the alleged easement in order to use the other parcel. *Condry,* 184 Md. at 317, 321, 41 A.2d at 66, 68, *cited in Shpak v. Oletsky,* 280 Md. 355, 360-61, 369, 373 A.2d 1234, 1238-39, 1242 (1977); *Jay v. Michael,* 92 Md. 198, 209, 48 A. 61, 63-64 (1900); *Eliason v. Grove,* 85 Md. 215, 225, 36 A. 844, 846 (1897) (easement to use well on another's lot); 3 H. Tiffany, The Law of Real Property § 779 (3d ed. 1939). Once necessity disappears, the easement expires. Elements factored into the necessity determination are the availability of other means of access to the property, and whether relocating an easement would present a cost unreasonable in relation to the entire cost of the property. *Beck v. Mangels,* 100 Md. App. 144, 160-01, 640 A.2d 236, 245 (1994).

Defendants have asserted that cases in which Maryland courts have contemplated easements of necessity have generally involved roads or pathways for ingress and egress, (*e.g. Greenwalt v. McCardell,* 178 Md. 132, 12 A.2d 522 (1940)), or utility pipelines (*e.g. Mitchell v. Houstle,* 217 Md. 259, 142 A.2d 556 (1958)), and that easements of necessity may not arise except under such circumstances. While it is true that none of the Maryland access cases have addressed a situation such as the one at hand, where access to

another parcel of one owner's property in order to conduct one's business, the underlying policy and rules of construction they have developed throughout the years provide guidance.

The seminal Maryland case on easements by necessity, *Condry v. Laurie*, explains that the doctrine of easements by necessity is based upon public policy, which is favorable to full utilization of land and the presumption that parties do not intend to render land unfit for occupancy. *Condry,* 41 A.2d at 68. Although easements by implication are generally looked upon with jealousy and are construed with strictness, *Condry,* 184 Md. at 321, 41 A.2d at 68, Maryland courts have been more lenient with respect to easements implied to have been granted to the grantee in a conveyance than those impliedly reserved for a grantor himself. *Shpak*, 373 A.2d at 1238 (*citing Slear v. Jankiewicz,* 189 Md. 18, 22, 54 A.2d 137, 139 (1947) *cert. denied*, 333 U.S. 827, 68 S. Ct. 453, 92 L. Ed. 1112 (1948)). Implied grants will be recognized when necessary to the reasonable enjoyment of the premises granted. *Beck,* 640 A.2d at 243-44 (citing with approval *George v. Phillips,* 642 S.W.2d 275 (Tex. 1982)); *Dalton v. Real Estate and Improvement Co.,* 201 Md. 34, 46-47, 92 A.2d 585, 591-92 (1952); *Greenwalt,* 12 A.2d at 525 (reasonably necessary for the fair enjoyment of the property). Easements of reservation require strict, actual necessity. *Beck,* 640 A.2d at 243.

In other jurisdictions at approximately the same time as the 1909 conveyance between CCLC and the Club, ways of necessity have been recognized to permit access to other land belonging to the same person, when such intervening strip was conveyed for a railroad right-of-way. *See* 3 H. Tiffany, Real Property, § 793 n. 26 (3d ed. 1939) (citing *Cleveland, C., C. & St. L. Ry. Co. v. Smith,* 177 Ind. 524, 97 N.E. 164, 169 (1912); *Vandalia R. Co. v. Furnas,* 182 Ind. 306, 106

N.E. 401; *Pittsburgh, C., C. & St. L. Ry. Co. v. Kearns,* 58 Ind. App. 694, 108 N.E. 873, 875 (1915); *New York, N. E. R. Co. v. Bd. of Ry. Comm'ners,* 162 Mass. 81, 38 N.E. 27, 28 (1894); *Uhl v. Ohio River R. Co.,* 47 W. Va. 59, 34 S.E. 934, 935 (1899)). These easements were recognized in circumstances in which grantors of rights-of-way asserted that they impliedly saved for themselves easements by reservation -- easements that courts are generally more reluctant to acknowledge than easements by grant. *See Beck,* 640 A.2d at 243; *Dalton,* 92 A.2d at 591-92; *Greenwalt,* 12 A.2d at 525.

The instant case involves similar facts regarding the apportionment of a right-of-way, however it constitutes a mirror image of the conveyances of these scenarios in that the Club asserts an easement by implied grant. Here the Club was the grantee of the two non-connected parcels in 1909 and another party, CCLC, granted the land to the Club and in so doing is alleged to have impliedly granted easements of necessity allowing passage across the right-of-way which it then owned. This is a scenario where a grantee asserts an implied easement. Considering that Maryland courts have voiced a less stringent standard regarding easements of necessity by implied grant, it would seem that Maryland law would permit the recognition of easements of necessity across the strip. This interpretation permits the full use of the land for its intended purpose, and is thus in keeping with the public policy of the state of Maryland. *See Condry,* 41 A.2d at 68.

Further, easements by necessity have been recognized in situations like the one involved in the instant case, in which a deed of conveyance provides that the land conveyed be used for a certain purpose, such as to operate a particular business or enterprise, and an easement over another parcel of land is necessary to carry out such purpose. *See* 3 H. Tiffany, Real

Property, § 792 (3d ed. 1939), *cited in* Cunningham, The Law of Property § 8.5, at 448 n.3. An easement by necessity may arise

> . . . upon a conveyance of land . . . by reason of a construction placed upon the language of the conveyance in accordance with what appears to be the necessity of the case . . . in order that land conveyed, or sometimes, the land retained, may be properly available for use.

3 H. Tiffany, Real Property, § 792 n.83. Among the examples of this construction are instances where mineral grantees have been entitled to build air shafts and water storage facilities, erect machinery and even to dump waste upon the grantors' land in order to conduct their businesses as was considered to be reasonably necessary. *Id.* at n.84-88 (*citing e.g. Marshall Ice Co. v. LaPlant,* 136 Iowa 621, 111 N.W. 1016, 1019 (1907) (grantor of land adjoining pond for an ice business grants privilege to have use of water in pond)). In the 1909 transaction between CCLC and the Club, the deed contemplated use of the two parcels for a particular purpose -- as a golf course. Therefore, necessity to use land upon the right-of-way for the Club's intended purpose may be established upon the facts presented, as well.

As an easement connecting two pieces of land over a right-of-way in order to conduct a business may be established by necessity, it remains to be decided whether the Club has established on summary judgment the three elements of the easement by necessity. The Club has illustrated that the first two requirements for a necessity easement are present with respect to the land it received in 1909. It received the vast majority of its land pursuant to a 1909 conveyance, and at that time there had been unity of title between the golf course parcels and the right-of-way in CCLC. In 1909 CCLC still held fee simple absolute title to

the right-of-way strip.[42] Subsequently, in 1911, MSRR acquired fee simple absolute title to the right-of-way, and thus there would be no unity of title between the additional portions of the golf club (conveyed to the Club in 1913, 1920 and 1940) and the right-of-way at the time of conveyance.

The final inquiry is whether reasonable necessity existed in 1909 and continues with respect to crossing the right-of-way. *See Condry*, 184 Md. at 317, 321, 41 A.2d at 66, 68. The Club has illustrated that at the time it acquired the golf course property, an easement of crossing was reasonably necessary to the use of the property as a golf course and for the Club to have access from the north to the south part of its property on either side of the right-of-way. The undisputed documentary evidence from that time reflects that the land lying to the north side of the property was not large enough to comprise the entire course, and therefore the south property was bought as well, and as the 1909 memorandum illustrates, passage between the two was a condition of the sale. See CBA-26. Additionally, the map illustrates no access on the sides of the golf course existed, and therefore, alternative passage was not available. *See* CBA-25, 25A, 36.

The papers filed by the Club indicate that Club members, guests and employees continue to cross the parcel on its designated paths because Montgomery County has not yet constructed its light-rail and hiker/biker trail on the right-of-way. However, the Club has not illustrated that necessity will be resurrected after Montgomery County completes this project -- the very eventuality which is at the core of the Club's taking claim. *See Feldstein,* 81 A.2d at 615. The Club

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[42] Montgomery County asserts that MSRR received equitable title pursuant to the 1891 Memorandum Agreement, even though that document was never recorded. *See supra* n.30 (recordation necessary to establish title; possible exception when unrecorded interest recognized is when contrary assertion made by one of parties to transaction).

has illustrated through its documents that alternative passage around the golf course is unavailable,[43] and has recognized such in the affidavit of Thomas Clark. *See* CBA-54, 57-58.

As part of the construction of the light-rail and hiker/biker trail, Montgomery County has proposed the building of tunnels underneath the right-of-way for crossing. The county provides that within the Club area, the trolley will be raised approximately five feet to provide for golf cart underpasses allowing for movement between the greens north and south of the alignment.[44] The Club has asserted that the construction of the underpasses which Montgomery County proposes would cause "inconvenience of golfers, golf cars, maintenance equipment, etc. being confined to a tunnel with its grades causing additional stress." This assertion does not establish that the proposed alternative to any overland crossing easements -- in the form of underpasses -- is not possible or is unreasonably expensive in relation to the cost of the property. Therefore, the Club has not established that the necessity required to resurrect any possible easement by necessity will not be obviated by Montgomery County's course of action in providing crossings. *See Beck*, 100 Md. App. at 160-01, 640 A.2d at 245. As such, the Club has not illustrated that its original license to use the right-of-way has

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[43] On the western end of the golf course there is a public street (Newdale Road) lying to the north of the right of way, and there is a body of water (Chevy Chase Lake) lying to the south of the right of way. On the eastern end of the golf course, the plat indicates that there is a forest (Columbia Forest). CBA-36.

[44] Report of Maryland DOT of January 15, 1991. The report also provides, "[o]n the eastern edge of the Country Club, the tournament tee at holes Nos. 15 & 18, which are within the existing railroad ROW (right-of-way), must be relocated or abandoned. Greens at holes 14 & 17 must also be modified." Although the plan will require the Club to relocate certain tees, holes and greens, this does not inform the inquiry of whether the Club has easement by necessity for crossing.

been terminated or somehow limited, in order to give rise to an easement by necessity for the residual crossing needs of the Club. Further, if an easement by necessity were proven, its physical area would need to be determined -- the amount of square footage as was necessary to provide sufficient crossing in 1909, the date of conveyance.

As the facts regarding the Club's assertion of a Fifth Amendment taking of an easement by necessity have not yet been developed to the extent necessary to present this claim: particularly since Montgomery County has not taken action to restrict access to the property, the Club's taking claim in this regard is premature at this juncture. As such, summary judgment with respect to the taking of any possible easements by necessity across the right-of-way in its favor is not appropriate. Rather, because sufficient facts were not alleged by the Club and because Defendant has shown there is presently no interest of the Club's which has been taken, summary judgment must be entered in favor of Defendants.

4. Lost Deed

As discussed above, the concept of lost deed will not support a prescriptive easement because the deeds of conveyance of the right-of-way are extant and document conveyances to parties other than the Club. *See Hammond*, 5 H. & J. 245, 264, 9 Am. Dec. 522 (Md. 1821).

D. Contract Clause

Finally, the Club asserts a constitutional claim premised upon the Contract Clause, which provides "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. Relying upon *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 240, 57 L. Ed. 2d 727, 98 S. Ct. 2716 (1978), the Club asserts that Montgomery County's assumption of the right-of-way constitutes a "legislative action" which may potentially result in the "severe

impairment" of the Club's 1909 contractual agreement with MSRR, and as such is unconstitutional.

Allied Structural Steel, a case involving legislation which adjusted the rights and responsibilities of contracting parties, provides that while the Contract Clause does not operate to obliterate the police power of the States, it does impose some limits upon the power of a State to abridge existing contractual relationships. 438 U.S. at 242-44. The contract at issue in this case, the 1909 license agreement between MSRR and the Club, was not impaired by way of any Rails-to-Trials caused "legislative action" on the part of Montgomery County, because once MSRR relinquished title to the right-of-way, the license contract ceased to exist.

License contracts are permissive by nature and do not run with the land -- therefore they expire upon the sale of the land upon which the licensed use occurs. *See Brack*, 175 Md. 615, 3 A.2d 471, *cited in Busada,* 31 Md. App. at 705-6, 358 A.2d at 259. Further, they are terminable at the will of the grantor. That Montgomery County may have passed legislation to enable itself to buy and utilize this strip -- as the Club points out -- is irrelevant to the issue at hand. Once Montgomery County bought the right-of-way, MSRR's license contract expired and therefore no impairment could have occurred.

Therefore, the Contract Clause does not provide for any redressable property interest on the part of the Club. Montgomery County has, in effect, extended a license to the Club to utilize the right-of-way subsequent to its 1986 purchase, *see* MC Opp. at 20 n. 5, thereby permitting the continuance of the use to which the Club argues it is contractually entitled.

2. Taking

Finally, the Club claims that once the light-rail and hiker/biker path are constructed and put to use, the right-of-way will be more heavily trafficked and it will be more difficult for Columbia to utilize its golf course, portions of which are alleged to be within the right-of-way. The Club maintains that this heavier burden, enabled by federal legislation -- the Rails-to-Trails Act, will interfere with its intended and current use of its property. This, the Club asserts, amounts to a taking of property in contravention of the Fifth Amendment. The Club cannot establish the requisite property interest or reasonable expectations to be free of such regulation.

The first step in establishing a taking involves demonstrating a compensable property interest pursuant to state law. *Lucas,* 505 U.S. at 1030. As determined above, to the extent that the Club asserts a taking of its property within the right-of-way, the Club has not established any property interest within this corridor.

The only property interest which the Club may possibly establish within the right-of-way is a limited one -- an easement by necessity. However, it has not and cannot yet do so because this interest is contingent upon Montgomery County's provision of crossing rights once its light-rail and trail project is completed. Montgomery County has offered such rights, so to the extent the Club asserts that they will be deficient or Montgomery County will not follow through, any claim in this regard is not yet ripe because the relevant facts surrounding any such claim have not yet unfolded. It is not within the purview of federal courts to decide controversies based on contingencies that have yet to ripen into eventualities. *See generally, Dames & Moore v. Regan,*

453 U.S. 654, 689 (1981); *Hodel v. Virginia Surface Mining & Reclamation Assoc'n,* 452 U.S. 264, 304 (1981).

The other property asserted to have been taken is the Club's adjacent golf course. *See* CBA-52, 54-59 (use of entire golf course, including tees and greens within the right-of-way will be subject to a litany of "potential problems.") The Club asserts that the Rails-to-Trails Act's enabling of the right of way to be transformed into a conduit with a light-rail and hiker/biker path will place a heavier burden of traffic upon its parcels. The Club property is, however, just as mentioned -- adjacent land, and not the actual right-of-way parcel which is regulated by the Rails-to-Trails Act. Damage caused to property adjacent to that subject to the complained-of legislation is not compensable. *See Lucas,* 505 U.S. at 1019 n.8 (while "landowner whose premises are taken for a highway" recovers in full while "landowner whose property is reduced to 5% of its former value by the highway" recovers nothing).

Were a qualifying property interest shown, to prevail, the Club would have to continue to prove that the federal regulation has interfered with this interest to the extent necessary to establish a taking. As stated above, under the Supreme Court's three-tiered analysis set forth in *Penn Central v. City of New York,* 438 U.S. 104, 124 (1978), the existence of a taking will hinge upon (1) the character of the governmental action, (2) the economic impact of the regulation, and (3) the extent to which that action interfered with the owner's legitimate, investment-backed expectations.

The Club cannot demonstrate the requisite expectations. The Club purchased the course in 1909, after having received a written license agreement from MSRR allowing for the crossing over and use of the right-of-way as necessary in conjunction with it. Now that Montgomery County plans to

place a hiker/biker trail and light-rail upon the same right-of-way, the Club asserts that it will suffer a taking.

The Club describes its harm as follows:

> A hiker biker trail will annually place 1.5 million public users in the heart of the Club's property in addition to light rail trolleys running as frequently as every six minutes. From approximately 1911 to 1985, the use of the right of way was limited to passage of an infrequent, slow-moving freight train which seldom, if ever, interfered with the Club's use of its property. The County's proposed plans, with the approval and potential support of the federal government, so fundamentally alter and interfere with the historic and present use of the adjacent golf course and Club as to render them significantly diminished or totally impaired. Such a result should not occur.

Club Reply at 5.

The Club has not, however, shown that MSRR or CCLC agreed that MSRR would continue to use the line for its railroad in perpetuity. The line might possibly have been sold by MSRR and used for quite different purposes including a road, trail or whatever might suit the present owner.

Further, the Club has not shown that MSRR or CCLC guaranteed that use of the right-of-way would be limited to the assertedly slow, infrequent transportation of: freight during MSRR's use of the line over the years. Montgomery County's uses of the right-of-way -- including pedestrians and faster-moving trains -- were not prohibited under the license agreements. The Club simply had no reasonable expectation that use of the right-of-way would remain as was contemplated in 1909.

Therefore, as the key component of the takings analysis cannot be satisfied, the Club's taking claim is not viable. Summary judgment in favor of Defendant, the United States, is therefore appropriate.

IV. CONCLUSION

In accordance with the conclusions reached:

IT IS ORDERED, that final summary judgment shall be entered in favor of the United States and Montgomery County, **DENYING** all claims asserted against the United States by Chevy Chase Land Company and Columbia Country Club and **DISMISSING** any claims not asserted against the United States as beyond the jurisdiction of the Court.

James F. Merow, Judge

United States Court of Appeals for the Federal Circuit

97-5079,-5083

THE CHEVY CHASE LAND COMPANY OF MONTGOMERY COUNTY, MARYLAND,

Plaintiff-Appellant,

and

COLUMBIA COUNTRY CLUB,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee,

and

MONTGOMERY COUNTY,

Defendant-Appellee.

ORDER

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by Chevy Chase Land Company, and responses thereto having been requested by the court and filed by Montgomery County and the United States, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal,

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for rehearing is granted for the limited and sole purpose of amending the opinion issued on December 17, 1999, as follows:

On the third line from the bottom of page 4, after the word "and" insert the word "held."

The petition for rehearing en banc is still pending.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: March 27, 2000

United States Court of Appeals for the Federal Circuit

97-5079,-5083

THE CHEVY CHASE LAND COMPANY OF MONTGOMERY COUNTY, MARYLAND,

Plaintiff-Appellant,

and

COLUMBIA COUNTRY CLUB,

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v.

UNITED STATES,

Defendant-Appellee,

and

MONTGOMERY COUNTY,

Defendant-Appellee.

ORDER

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the Chevy Chase Land Company, and responses thereto having been invited by the court and filed by the APPELLEES, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and responses having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 13, 2000.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: April 6, 2000

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* Note: Pursuant to Fed. Cir. R. 47.6, this order *
* is not citable as precedent. It is a public record. *
* *

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16 U.S.C. §1247(d)

16 U.S.C. § 1247(d), enacted in 1983, read as follows until a 1995 amendment changed references to the Interstate Commerce Commission to the Surface Transportation Board:

> The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with the National Trails System Act, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.